

District of Columbia Code

1981 Edition



Property of the District of Columbia Government

DISTRICT OF COLUMBIA CODE

ANNOTATED

1981 EDITION

With Provision for Subsequent Pocket Parts

CONTAINING THE LAWS, GENERAL AND PERMANENT IN THEIR NATURE,
RELATING TO OR IN FORCE IN THE DISTRICT OF COLUMBIA
(EXCEPT SUCH LAWS AS ARE OF APPLICATION IN THE
DISTRICT OF COLUMBIA BY REASON OF BEING
GENERAL AND PERMANENT LAWS OF THE
UNITED STATES), AS OF FEBRUARY 9, 1996,
AND NOTES TO DECISIONS
THROUGH MARCH 1, 1996

VOLUME 5A

1996 REPLACEMENT

TITLE 22—CRIMINAL OFFENSES
TITLE 23—CRIMINAL PROCEDURE

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USER'S GUIDE

In order to assist both the legal profession and the layman in obtaining the maximum benefit from the District of Columbia Code, a User's Guide has been included in Volume 1 of the Code. This guide contains comments and information on the many features found within the District of Columbia Code intended to increase the usefulness of the Code to the user.

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CHAPTER 1. GENERAL PROVISIONS.

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§ 22-101. "Writing" and "paper" defined.

Except where otherwise provided for where such a construction would be unreasonable, the words "writing" and "paper," wherever mentioned in this title, are to be taken to include instruments wholly in writing or wholly printed, or partly printed and partly in writing. (Mar. 3, 1901, 31 Stat. 1336, ch. 854, § 904; 1973 Ed., § 22-101; Dec. 1, 1982, D.C. Law 4-164, § 601(b), 29 DCR 3976.)

Legislative history of Law 4-164. — Law 4-164, the "District of Columbia Theft and White Collar Crimes Act of 1982," was introduced in council and assigned Bill No. 4-133, which was referred to the Committee on the Judiciary. The Bill was adopted on first,

amended first and second readings on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.

§ 22-102. "Anything of value" defined.

The words "anything of value," wherever they occur in this title and the District of Columbia Theft and White Collar Crimes Act of 1982, shall be held to include not only things possessing intrinsic value, but bank notes and other forms of paper money, and commercial paper and other writings which represent value. (Mar. 3, 1901, 31 Stat. 1336, ch. 854, § 905; 1973 Ed., § 22-102; Dec. 1, 1982, D.C. Law 4-164, § 601(c), 29 DCR 3976.)

Legislative history of Law 4-164. — See note to § 22-101.

References in text. — The "District of Columbia Theft and White Collar Crimes Act of 1982", referred to in this section, is D.C. Law 4-164, codified primarily at § 22-3801 et seq.

Signed check taken without right was a thing "of value" regardless of whether the account on which it was to be drawn lacked sufficient funds to cover the check, or whether a stop-payment order was in effect. *Jeffcoat v. United States*, App. D.C., 551 A.2d 1301 (1988).

§ 22-103. Attempts to commit crime.

Whoever shall attempt to commit any crime, which attempt is not otherwise made punishable by chapter 19 of An Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321), shall be punished by a fine not exceeding \$1,000 or by imprisonment for not more than 180 days, or both. Except, whoever shall attempt to commit a crime of violence as defined in § 23-1331 shall be punished by a fine not exceeding \$5,000 or by imprisonment for not more than 5 years, or both. (Mar. 3, 1901, 31 Stat. 1337,

ch. 854, § 906; 1973 Ed., § 22-103; Aug. 20, 1994, D.C. Law 10-151, § 105(a), 41 DCR 2608.)

Effect of amendments. — D.C. Law 10-151 substituted “180 days” for “1 year” in the first sentence; and added the second sentence.

Emergency act amendments. — For temporary amendment of section, see § 105(a) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — Law 10-151, the “Omnibus Criminal Justice Reform Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

References in text. — “Chapter 19 of an Act to establish a code of law for the District of Columbia, approved March 3, 1901 (31 Stat. 1321),” referred to in this section, consists of §§ 798 to 910 of the act of March 3, 1901, the provisions of which are codified throughout this title as well as in §§ 40-713 to 40-715, 48-101, 48-102 and 48-301 to 48-307. For the complete codification of Chapter 19 of the March 3, 1901 act, please consult the Disposition Tables appearing in Volume 11 of the Code, specifically pages 92 to 94, as well as the updates appearing in the supplement to that volume.

Mere preparation is not attempt, but preparation may progress to point of attempt, and the question of whether it has done so is one of degree which can be resolved only on basis of facts of each case. *Sellers v. United States*, App. D.C., 131 A.2d 300 (1957); *Freeman v. United States*, App. D.C., 495 A.2d 1183 (1985).

Elements of attempt to commit crime are an intent to commit it, the doing of some act towards its commission, and the failure to consummate its commission. *Marganella v. United States*, App. D.C., 268 A.2d 803 (1970); *Blackledge v. United States*, App. D.C., 447 A.2d 46 (1982); *Shelton v. United States*, App. D.C., 505 A.2d 767 (1986).

To show attempt, the government needs only to prove an overt act done with the intent to commit a crime, and which, except for some interference, would have resulted in the commission of the crime. *Wormsley v. United States*, App. D.C., 526 A.2d 1373 (1987).

“Chapter 19” construed. — Chapter 19 referred to in this section — the “general attempts” statute — was actually Chapter 19 of the 1901 District of Columbia Code, which

chapter is only a portion of the present Title 22 (and is a portion that does not and did not include § 22-3427 or any of its predecessors). Thus, this section does not apply to § 22-3427, and the crime of “attempted breaking and entering — vending machine” therefore does not exist in the District of Columbia. *United States v. Hughes*, 115 WLR 1077 (Super. Ct. 1987).

And proof of completed offense no bar to trial for attempt. — If a defendant is charged with an attempt to commit a felony, he may be found guilty of the attempt, though the evidence shows a completed offense. *United States v. Fleming*, App. D.C., 215 A.2d 839 (1966).

But maximum penalty not to exceed that for completed offense. — The maximum penalty for attempted petit larceny can be no greater than the maximum penalty for the completed offense. *United States v. Pearson*, App. D.C., 202 A.2d 392 (1964).

And maximum sentence may bar cumulative punishment. — Since the crimes of attempted second degree burglary and malicious destruction of property are offenses against the same societal interest, and since this section limits the maximum prison sentence for an attempt to 1 year, the defendant’s convictions, for a single incident, for attempted second degree burglary and for malicious destruction of property, with respective consecutive sentences of 1 year and 6 months, are not appropriate for cumulative punishment. *Johnson v. United States*, App. D.C., 265 A.2d 780 (1970).

Section applicable to attempted petit larceny. — This section covers attempted petit larceny not expressly covered by any other statute. *United States v. Pearson*, App. D.C., 202 A.2d 392 (1964).

And attempted unauthorized use of motor vehicle. — Attempted unauthorized use of a motor vehicle is a crime under this section. *Greenwood v. United States*, App. D.C., 225 A.2d 878 (1967); *Dickson v. United States*, App. D.C., 226 A.2d 364 (1967).

And attempted burglary in second degree. — The statutory provision for a 2-year mandatory minimum sentence for burglary does not operate to prevent prosecution and sentencing for the lesser misdemeanor of attempted burglary in the second degree under this section. *King v. United States*, App. D.C., 271 A.2d 556 (1970).

And attempted sodomy. — This section permits one to be convicted of an attempt to commit sodomy. *United States v. Fleming*, App. D.C., 215 A.2d 839 (1966).

Section inapplicable. — One who assaults a female under 16 years of age, with intent to

carnally know her, is punishable under § 22-501 and not this section. *Sanselo v. United States*, 44 App. D.C. 508 (1916).

Evidence sufficient to sustain conviction of attempted housebreaking. — See *Adams v. United States*, App. D.C., 245 A.2d 640 (1968).

Evidence sufficient to prove attempted false pretenses involving misuse of credit card. — See *Marganella v. United States*, App. D.C., 268 A.2d 803 (1970); *Blackledge v. United States*, App. D.C., 447 A.2d 46 (1982).

Evidence sufficient to prove attempt by false pretenses to obtain money from insurance company. — See *Cooper v. United States*, App. D.C., 123 A.2d 918 (1956).

Evidence sufficient to support conviction for attempted burglary in second degree. — See *Hopkins v. United States*, App. D.C., 274 A.2d 418 (1971); *Valentino v. United States*, App. D.C., 296 A.2d 173 (1972); *Freeman v. United States*, App. D.C., 495 A.2d 1183 (1985).

Evidence sufficient to sustain convictions for attempted second degree burglary and attempted petit larceny. — See *Manning v. United States*, App. D.C., 270 A.2d 504 (1970); *Baptist v. United States*, App. D.C., 466 A.2d 452 (1983).

Evidence was sufficient for the court to have found, beyond a reasonable doubt, that defendant had attempted to take a dress and to carry it away from the store. *Wormsley v. United States*, App. D.C., 526 A.2d 1373 (1987).

Evidence sufficient to sustain conviction for attempted store breaking. — See *Patten v. United States*, App. D.C., 248 A.2d 182 (1968).

Evidence sufficient to prove attempt to receive money for arranging for female to have sexual intercourse. — See *Sellers v. United States*, App. D.C., 131 A.2d 300 (1957).

Evidence sufficient to sustain conviction for attempted procuring. — See *Walker v. United States*, App. D.C., 248 A.2d 187 (1968); *Langley v. United States*, App. D.C., 264 A.2d 503 (1970).

Evidence insufficient to sustain conviction for attempted burglary. — See *Barnes v. United States*, App. D.C., 254 A.2d 724 (1969).

Evidence insufficient to prove attempted burglary in second degree and attempted petit larceny. — See *Perry v. United States*, App. D.C., 276 A.2d 719 (1971).

Evidence insufficient to sustain conviction for attempted housebreaking and petit larceny. — See *Davis v. United States*, App. D.C., 230 A.2d 485 (1967); *Townsley v. United States*, App. D.C., 236 A.2d 63 (1967).

Evidence insufficient to support conviction for breaking into a parking meter. —

Where an eyewitness and the arresting officer both testified, identifying the defendant as 1 of 2 men who tried to break into a parking meter, but where the government presented no evidence that the defendant lacked authority to open the meter, the evidence was insufficient to support a conviction. *Bolan v. United States*, App. D.C., 587 A.2d 458 (1991).

No aggregation of misdemeanors to reach threshold required for jury trial. — The Superior Court would not aggregate the penalties for multiple misdemeanor offenses charged in order to reach the threshold penalty required for a jury trial. *United States v. Joseph*, 122 WLR 2337 (Super. Ct. 1994).

Jury right determined by imprisonment for completed crime. — Right to a jury trial for an attempted offense is determined by the maximum imprisonment which could actually be imposed for the completed offense. *United States v. Evans*, 112 WLR 1721 (Super. Ct. 1984).

Cited in *Blakney v. United States*, App. D.C., 225 A.2d 654 (1967); *Wesley v. United States*, App. D.C., 233 A.2d 514 (1967); *Weeks v. United States*, App. D.C., 252 A.2d 907 (1969); *Hebble v. United States*, App. D.C., 257 A.2d 483 (1969); *Killens v. United States*, App. D.C., 263 A.2d 44 (1970); *Smith v. United States*, App. D.C., 269 A.2d 446 (1970); *Campbell v. United States*, App. D.C., 273 A.2d 252 (1971); *Coleman v. United States*, App. D.C., 298 A.2d 40 (1972), cert. denied, 413 U.S. 921, 93 S. Ct. 3070, 37 L. Ed. 2d 1043 (1973); *Owens v. United States*, App. D.C., 340 A.2d 821 (1975); *Flecher v. United States*, App. D.C., 358 A.2d 322, cert. denied, 429 U.S. 977, 97 S. Ct. 486, 50 L. Ed. 2d 585 (1976); *Royster v. United States*, App. D.C., 361 A.2d 165 (1976); *Montgomery v. United States*, App. D.C., 384 A.2d 655 (1978); *Wynn v. United States*, App. D.C., 386 A.2d 695 (1978); *Lewis v. United States*, App. D.C., 389 A.2d 306 (1978); *Johnson v. United States*, App. D.C., 404 A.2d 162 (1979); *Leftridge v. United States*, App. D.C., 410 A.2d 1388 (1980); *Lucas v. United States*, App. D.C., 411 A.2d 360 (1980); *Clark v. United States*, App. D.C., 416 A.2d 717, cert. denied, 449 U.S. 922, 101 S. Ct. 323, 66 L. Ed. 2d 151 (1980); *Kinard v. United States*, App. D.C., 416 A.2d 1232 (1980); *Wilkerson v. United States*, App. D.C., 432 A.2d 730, cert. denied, 454 U.S. 1090, 102 S. Ct. 654, 70 L. Ed. 2d 628 (1981); *Stepney v. United States*, App. D.C., 443 A.2d 555 (1982); *United States v. Mendelsohn*, App. D.C., 443 A.2d 1311 (1982); *Cornwell v. United States*, App. D.C., 451 A.2d 628 (1982); *Jones v. United States*, 463 U.S. 354, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983); *Brodus v. United States*, App. D.C., 468 A.2d 1335 (1983); *Dumas v. United States*, App. D.C., 483 A.2d 301 (1984); *Chavez v. United States*, App. D.C., 499 A.2d 813 (1985); *Settles v. United States*, App. D.C., 522 A.2d 348

(1987); *German v. United States*, App. D.C., 525 A.2d 596, cert. denied, 484 U.S. 944, 108 S. Ct. 331, 98 L. Ed. 2d 358 (1987); *United States v. Wheeler*, 115 WLR 2025 (Super. Ct. 1987); *Cowan v. United States*, App. D.C., 547 A.2d 1011 (1988); *Seeney v. United States*, App. D.C., 563 A.2d 1081 (1989), cert. denied, 498 U.S. 858, 111 S. Ct. 158, 112 L. Ed. 2d 124 (1990);

Douglas v. United States, App. D.C., 570 A.2d 772 (1990); *Belton v. United States*, App. D.C., 581 A.2d 1205 (1990); *Smith v. United States*, App. D.C., 597 A.2d 377 (1991); *Harris v. United States*, App. D.C., 602 A.2d 1140 (1992); *Riley v. United States*, App. D.C., 647 A.2d 1165 (1994); *Lee v. United States*, App. D.C., 668 A.2d 822 (1995).

§ 22-104. Second conviction.

(a) If any person: (1) Is convicted of a criminal offense (other than a non-moving traffic offense) under a law applicable exclusively to the District of Columbia; and (2) was previously convicted of a criminal offense under any law of the United States or of a state or territory of the United States which offense, at the time of the conviction referred to in clause (1) of this subsection, is the same as, constitutes, or necessarily includes, the offense referred to in that clause, such person may be sentenced to pay a fine in an amount not more than one and one-half times the maximum fine prescribed for the conviction referred to in clause (1) of this subsection and sentenced to imprisonment for a term not more than one and one-half times the maximum term of imprisonment prescribed for that conviction. If such person was previously convicted more than once of an offense described in clause (2) of this subsection, such person may be sentenced to pay a fine in an amount not more than 3 times the maximum fine prescribed for the conviction referred to in clause (1) of this subsection and sentenced to imprisonment for a term not more than 3 times the maximum term of imprisonment prescribed for that conviction. No conviction with respect to which a person has been pardoned on the ground of innocence shall be taken into account in applying this section.

(b) This section shall not apply in the event of conflict with any other provision of law which provides an increased penalty for a specific offense by reason of a prior conviction of the same or any other offense. (Mar. 3, 1901, 31 Stat. 1337, ch. 854, § 907; July 29, 1970, 84 Stat. 598, Pub. L. 91-358, title II, § 201(a); 1973 Ed., § 22-104; May 21, 1994, D.C. Law 10-119, § 2(a), 41 DCR 1639.)

Cross references. — As to proceedings to establish previous convictions, see § 23-111.

Effect of amendments. — D.C. Law 10-119 substituted “such person” for “he” following “clause (2) of this subsection” in the second sentence of (a).

Legislative history of Law 10-119. — Law 10-119, the “Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Purpose of this section is to provide new tools and sentencing alternatives to the trial judge to protect society and to secure certain additional safeguards, due process rights, and the rehabilitation of the convicted offender. *Smith v. United States*, App. D.C., 304 A.2d 28, cert. denied, 414 U.S. 1114, 94 S. Ct. 846, 38 L. Ed. 2d 741 (1973).

This section is intended to give the sentencing judge discretion to impose progressively longer sentences for individuals who persist in a course of criminal activity. *Leftridge v. United States*, App. D.C., 410 A.2d 1388 (1980).

Sentence under this section is not part of offense itself; this section comes into play after the trial and after the accused has been found guilty, and proceedings under this section do not involve inquiry into guilt or inno-

cence. *Smith v. United States*, App. D.C., 304 A.2d 28, cert. denied, 414 U.S. 1114, 94 S. Ct. 846, 38 L. Ed. 2d 741 (1973).

Prior conviction, regardless of the date was underlying crime committed, is sufficient to trigger the repeat offender sentencing provisions of this section. *Cornwell v. United States*, App. D.C., 451 A.2d 628 (1982).

Repeat offender convicted under § 22-505(b) is subject to more severe punishment because of the continuing threat he represents. *Lagon v. United States*, App. D.C., 442 A.2d 166 (1982).

Proof of two felonies required. — Trial court, for enhancement purposes, must have all the correct information before it for sentencing; sentence may be enhanced, pursuant to the provisions of § 22-104a, only after the government in defendant's presence has introduced evidence proving beyond a reasonable doubt that defendant has committed the two felonies required for enhancement. *Shepard v. United States*, App. D.C., 538 A.2d 1115 (1988).

Notice of second offender prosecution necessary. — A defendant has the right to be given notice of the government's intention to prosecute him as a second offender and to ask for heavier penalties under this section: the notice should be formal: informal notice, originating with the court, acquiesced in by the prosecution, and with the burden on the defendant's counsel to convey notice to the defendant, is insufficient. *Brandon v. United States*, App. D.C., 239 A.2d 159 (1968).

On sentence as first offender. — Where no notice was given to the defendant that the government intended to ask for greater penalties as a second offender, the defendant was only subject to the penalty that could be imposed on a first offender. *Dobkin v. District of Columbia*, App. D.C., 194 A.2d 657 (1963); *Brandon v. United States*, App. D.C., 239 A.2d 159 (1968); *Martin v. United States*, App. D.C., 283 A.2d 448 (1971).

Where a defendant was not given timely notice that he would be prosecuted as a second offender but was sentenced in accordance with the penalties of this section, he was subject only to the 1-year maximum penalty that could be imposed upon a first offender, and an additional 6 months sentence on a petit larceny charge had to be set aside. *Lawrence v. United States*, App. D.C., 224 A.2d 306 (1966).

Timeliness of notice. — In second offender cases, the government must advise a defendant of the penalty to be demanded in time for him to demand a jury trial. *Dobkin v. District of Columbia*, App. D.C., 194 A.2d 657 (1963).

Approved practice of notifying defendant. — The practice of a district attorney's office, when intending to prosecute a defendant as a second offender, to file a written notice to that effect, specifically referring to the former

conviction, its nature and date, and to deliver a copy of such notice to the defendant personally, is approved. *Brandon v. United States*, App. D.C., 239 A.2d 159 (1968).

But court not to suggest second offender prosecution. — The practice of prosecuting a defendant as a second offender only on the suggestion of the trial court and not at the suggestion of the district attorney's office is disapproved. *Brandon v. United States*, App. D.C., 239 A.2d 159 (1968).

Finality of first, unobjected to, conviction. — When defendant appears and pleads to an information for petit larceny and is tried in the police court without objection, he admits the validity of the information, and, if convicted, he cannot afterwards, when indicted for petit larceny as a second offense, deny the legal sufficiency of the information as not being sworn to or claim that his first arrest was illegal. *Latney v. United States*, 18 App. D.C. 265 (1901).

Admission by counsel not waiver of proof of prior conviction. — The admission of defendant's counsel, in answer to the court's question, that the defendant had a prior conviction of either petit larceny or attempted petit larceny was not a waiver of proof of a prior conviction. *Brandon v. United States*, App. D.C., 239 A.2d 159 (1968).

Nor reference by trial court at bench conference. — A reference by the trial court at a bench conference to a grand larceny in 1964, apparently based on information obtained from a paper produced by the prosecuting attorney, did not constitute proof of a former conviction. *Brandon v. United States*, App. D.C., 239 A.2d 159 (1968).

Sentence invalid unless court asks defendant to deny or affirm previous convictions. — The trial judge's failure to inquire of a defendant whether he affirmed or denied the previous convictions contained in the government's information invalidated a sentence for carrying a pistol without a license imposed under this section. *Irby v. United States*, App. D.C., 342 A.2d 33 (1975).

Use of prior conviction for this section but not § 22-104a. — Where a defendant's prior felony conviction for armed robbery was used first to expose him to the express provisions for recidivism in § 22-3204 and then to enhance the maximum sentence for the defendant's conviction of another robbery under this section, the rule established in *Henson v. United States*, App. D.C., 309 A.2d 16, cert. denied, 444 U.S. 848, 100 S. Ct. 96, 62 L. Ed. 2d 62 (1979) was not violated, in that the defendant's prior felony conviction was not used to convert his § 22-3204 weapons offense into a felony and then used to serve as 1 of 2 prior felony convictions for enhanced sentencing un-

der § 22-104a. *Jones v. United States*, App. D.C., 416 A.2d 1236 (1980).

Cited in *Dancy v. United States*, 361 F.2d 75 (D.C. Cir. 1965); *Tatum v. United States*, App. D.C., 330 A.2d 522 (1974); *Henson v. United States*, App. D.C., 399 A.2d 16, cert. denied, 444 U.S. 848, 100 S. Ct. 96, 62 L. Ed. 2d 62 (1979); *United States v. Anderson*, 670 F.2d 328 (D.C. Cir. 1982); *Arnold v. United States*, App. D.C., 443 A.2d 1318 (1982); *United States v. Williams*, 110 WLR 1601 (Super. Ct. 1982); *United States v. Short*, 111 WLR 81 (Super. Ct. 1983); *Fitzgerald v. United States*, App. D.C., 472 A.2d 52 (1984); *Brake v. United States*, App. D.C.,

494 A.2d 646 (1985); *United States v. Mitchell*, 114 WLR 1257 (Super. Ct. 1986); *Finney v. United States*, App. D.C., 527 A.2d 733 (1987); *Wilson v. United States*, App. D.C., 528 A.2d 876 (1987); *Fields v. United States*, App. D.C., 547 A.2d 138 (1988); *District of Columbia v. Alston*, 116 WLR 2369 (Super. Ct. 1988); *Lucas v. United States*, App. D.C., 602 A.2d 1107 (1992); *United States v. Johnson*, 120 WLR 1629 (Super. Ct. 1992); *Coleman v. United States*, App. D.C., 628 A.2d 1005 (1993); *United States v. Joseph*, 122 WLR 2337 (Super. Ct. 1994).

§ 22-104a. Penalty for felony after at least 2 prior felony convictions.

(a)(1) If a person is convicted in the District of Columbia of a felony, having previously been convicted of 2 prior felonies not committed on the same occasion, the court may, in lieu of any sentence authorized, impose such greater term of imprisonment as it deems necessary, up to, and including, life.

(2) If a person is convicted in the District of Columbia of a crime of violence as defined by § 22-3201, having previously been convicted of 2 prior crimes of violence not committed on the same occasion, the court may, in lieu of any sentence authorized, impose a term of imprisonment of life without possibility of parole.

(b) For the purposes of this section:

(1) A person shall be considered as having been convicted of a felony if the person was convicted of a felony by a court of the District of Columbia, any state, or the United States or its territories; and

(2) A person shall be considered as having been convicted of a crime of violence if the person was convicted of a crime of violence as defined by § 22-3201, by a court of the District of Columbia, any state, or the United States or its territories.

(c)(1) A person shall be considered as having been convicted of 2 felonies if the person has been convicted of a felony twice before on separate occasions by courts of the District of Columbia, any state, or the United States or its territories.

(2) A person shall be considered as having been convicted of 2 crimes of violence if the person has twice before on separate occasions been convicted of a crime of violence as defined by § 22-3201, by courts of the District of Columbia, any states, or the United States or its territories.

(d) No conviction or plea of guilty with respect to which a person has been pardoned shall be taken into account in applying this section. (Mar. 3, 1901, ch. 854, § 907a; July 29, 1970, 84 Stat. 599, Pub. L. 91-358, title II, § 201(b); 1973 Ed., § 22-104a; May 21, 1994, D.C. Law 10-119, § 2(b), 41 DCR 1639; Oct. 7, 1994, D.C. Law 10-194, § 2, 41 DCR 4283; May 16, 1995, D.C. Law 10-255, § 15, 41 DCR 5193.)

Cross references. — As to proceedings to establish previous convictions, see § 23-111.

Section references. — This section is referred to in § 16-710.

Effect of amendments. — D.C. Law 10-119 substituted “the person” for “he” and “his or her” for “his” throughout this section.

D.C. Law 10-194 rewrote this section.

Neither D.C. Law 10-119 nor D.C. Law 10-194 referred to the other, and effect has been given to D.C. Law 10-194.

D.C. Law 10-255 substituted “§ 907a” for “§ 907A” in the historical citation.

Legislative history of Law 10-119. — See note to § 22-104.

Legislative history of Law 10-194. — Law 10-194, the “Repeat Offender Life Without Parole Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-478, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on June 7, 1994, and June 21, 1994, respectively. Signed by the Mayor on June 21, 1994, it was assigned Act No. 10-254 and transmitted to both Houses of Congress for its review. D.C. Law 10-194 became effective on October 7, 1994.

Legislative history of Law 10-255. — Law 10-255, the “Technical Amendments Act of 1994,” was introduced in Council and assigned Bill No. 10-673, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on June 21, 1994, and July 5, 1994, respectively. Signed by the Mayor on July 25, 1994, it was assigned Act No. 10-302 and transmitted to both Houses of Congress for its review. D.C. Law 10-255 became effective May 16, 1995.

This section provides enhanced punishment for habitual criminals. *Henson v. United States*, App. D.C., 399 A.2d 16, cert. denied, 444 U.S. 848, 100 S. Ct. 96, 62 L. Ed. 2d 62 (1979).

Purpose of this section is to provide new tools and sentencing alternatives to the trial judge to protect society and to secure certain additional safeguards, due process rights, and the rehabilitation of the convicted offender. *Smith v. United States*, App. D.C., 304 A.2d 28, cert. denied, 414 U.S. 1114, 94 S. Ct. 846, 38 L. Ed. 2d 741 (1973).

This section permits a sentencing judge to increase a sentence to what he deems necessary. *O'Connor v. United States*, App. D.C., 399 A.2d 21 (1979).

“Initial sentencing.” — Suspension of imposition of sentence coupled with a probation order does constitute “initial sentencing” within the meaning of paragraph (2) of subsection (b) of this section. *McDonald v. United States*, App. D.C., 415 A.2d 538 (1980).

Procedures involved in enhanced sentencing must be strictly followed. — En-

hanced sentencing involves incarceration for extended periods of time; the procedures involved in such augmented sentences must therefore be strictly followed. *Robinson v. United States*, App. D.C., 454 A.2d 810 (1982).

This section has no applicability where the offense itself authorizes maximum life sentence. *Morris v. United States*, App. D.C., 436 A.2d 377 (1981).

Where the substantive offense for which the defendant is convicted carries a potential life sentence, the court cannot impose any “greater” sentence “in lieu of” the sentence otherwise authorized, because there is nothing greater than a life sentence under this section. *Morris v. United States*, App. D.C., 436 A.2d 377 (1981).

Convictions arising from separate indictments handed down on the same date cannot be relied on to enhance punishment as a third offender. *Washington v. United States*, App. D.C., 343 A.2d 560 (1975).

And multiple use of enhancement in single proceeding limited. — In the same proceeding, a single prior felony conviction may not be used to convert a conviction under § 22-3204 into a felony offense and to serve as 1 of the 2 prior felony convictions for enhanced sentencing under this section. *Henson v. United States*, App. D.C., 399 A.2d 16, cert. denied, 444 U.S. 848, 100 S. Ct. 96, 62 L. Ed. 2d 62 (1979).

Although in *Henson v. United States*, App. D.C., 399 A.2d 16, cert. denied, 444 U.S. 848, 100 S. Ct. 96, 62 L. Ed. 2d 62 (1979), the court held that “in the same proceeding, a single prior felony conviction may not be used to convert a conviction under § 22-3204 into a felony offense and to serve as one of the two prior felony convictions for enhanced sentencing under § 22-104a,” where none of defendant’s prior felony convictions is used to do “double duty,” this rule is inapplicable. *Bigelow v. United States*, App. D.C., 498 A.2d 210 (1985), dismissed sub nom. *Bigelow v. Knight*, 737 F. Supp. 669 (1990).

Joint application of the habitual offender enhancement provisions of this section and the enhancement provisions of other specific felony statutes is not precluded by the rules of statutory construction or the rule of lenity where the policies underlying the enhanced penalty provisions are different and where the enhancement provisions do not have the same precondition to applicability. *Bigelow v. United States*, App. D.C., 498 A.2d 210 (1985), dismissed sub nom. *Bigelow v. Knight*, 737 F. Supp. 669 (1990).

Sentence enhancement under § 22-3204 and habitual offender enhancement. — A defendant convicted of carrying a pistol without a license under § 22-3204 may be subject not only to the sentence enhancement provision of that section, but also to the habitual offender

enhancement provisions of this section. *Bigelow v. United States*, App. D.C., 498 A.2d 210 (1985), dismissed sub nom. *Bigelow v. Knight*, 737 F. Supp. 669 (1990).

Recidivist sentencing invalid unless defendant affirms or denies previous convictions. — A trial judge's failure to inquire of a defendant whether he affirms or denies the previous convictions contained in the government's information invalidates a sentence for carrying a pistol without a license imposed under this section. *Irby v. United States*, App. D.C., 342 A.2d 33 (1975).

And information on prior felonies to be filed with clerk of court. — An enhanced sentence could not be imposed upon the defendant, found guilty of grand larceny, where the information as to the prior felony convictions was not filed with the clerk of court prior to trial as required by § 23-111. *Bond v. United States*, App. D.C., 310 A.2d 221 (1973).

There is no statutory requirement that defendant be placed under oath to raise issues of proof required by this section, nor is there any statutory requirement that any

inquiry of any sort be made of the defendant during the hearing phase of the recidivist sentencing process. *Boswell v. United States*, App. D.C., 511 A.2d 29 (1986).

Limited applicability of felony definition. — Application of the felony definition contained in this section is specifically limited to use under this section. *Scott v. United States*, App. D.C., 392 A.2d 4 (1978).

Facts held insufficient to establish prima facie case of identity of person. — See *Boswell v. United States*, App. D.C., 511 A.2d 29 (1986).

Cited in *Harvey v. United States*, App. D.C., 395 A.2d 92 (1978), cert. denied, 441 U.S. 936, 99 S. Ct. 2061, 60 L. Ed. 2d 665 (1979); *Glass v. United States*, App. D.C., 395 A.2d 796 (1978); *Rogers v. United States*, App. D.C., 419 A.2d 977 (1980); *United States v. Anderson*, 670 F.2d 328 (D.C. Cir. 1982); *Cornwell v. United States*, App. D.C., 451 A.2d 628 (1982); *Worthy v. United States*, App. D.C., 509 A.2d 1157 (1986).

§ 22-105. Persons advising, inciting, or conniving at criminal offense to be charged as principals.

In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be. (Mar. 3, 1901, 31 Stat. 1337, ch. 854, § 908; 1973 Ed., § 22-105.)

Section extends vicarious responsibility. — This section does not alter the common law rule with respect to legal responsibility of joint principals for each other's acts; it merely extends such doctrine of vicarious responsibility to additional classes of offenders by treating them as principals. *Hazel v. United States*, App. D.C., 353 A.2d 280 (1976).

An aider and abetter of an armed robbery is not guilty of a lesser included offense but is a principal to the robbery. *Atkinson v. United States*, App. D.C., 322 A.2d 587 (1974).

Section 22-2401 by its terms imposes felony-murder liability solely on the person who does the killing, so that other participants in the felony are exposed to first degree murder liability only by virtue of this section. *Christian v. United States*, App. D.C., 394 A.2d 1 (1978), cert. denied, 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315 (1979).

The common law concepts of causation and vicarious responsibility are operative in applying the District of Columbia's felony murder statute. The accomplice who aids and abets the commission of a felony is legally responsible as

a principal for all acts of the other person which are in furtherance of the common design or plan to commit the felony, or are the natural and probable consequences of acts done in the perpetration of the felony. *United States v. Sampol*, 636 F.2d 621 (D.C. Cir. 1980), overruled on other grounds, 717 F.2d 1444 (D.C. Cir. 1983).

Appellant was guilty of murder for advising, inciting, or conniving at the offense, or aiding and abetting the principal, even if the jury believed that appellant did not personally pull the trigger. *Morris v. United States*, App. D.C., 622 A.2d 1116, cert. denied, — U.S. —, 114 S. Ct. 270, 126 L. Ed. 2d 221 (1993).

As one who aids in commission of crime is as responsible for that act as if he committed it directly. *Williams v. United States*, App. D.C., 190 A.2d 269 (1963); *Montgomery v. United States*, App. D.C., 384 A.2d 655 (1978).

A defendant who aids and abets the taking of an automobile and other property is liable as a principal. *Williams v. United States*, 215 F.2d 35 (D.C. Cir. 1954); *Allen v. United States*, 257 F.2d 188 (D.C. Cir. 1958).

Under this section a person shown to be an accessory before the fact is chargeable and criminally responsible as a principal. *Williams v. United States*, 4 F.2d 432 (D.C. Cir. 1925); *Ladrey v. United States*, 155 F.2d 417 (D.C. Cir.), cert. denied, 329 U.S. 723, 67 S. Ct. 68, 91 L. Ed. 627 (1946).

Even if no active participation. — Aiding and abetting assault renders one guilty of crime even if he does not actively participate. *Rogers v. United States*, App. D.C., 174 A.2d 356 (1961).

As act of one principal deemed act of each. — Where defendants are charged as principals under this section, an act of one defendant is an act of each. *Turberville v. United States*, 303 F.2d 411 (D.C. Cir.), cert. denied, 370 U.S. 946, 82 S. Ct. 1607, 8 L. Ed. 2d 813 (1962).

An accomplice who aids and abets the commission of a felony is legally responsible as a principal for all acts of another person which are in furtherance of the common purpose, if the act done either is within the scope of that purpose or is the natural or probable consequence of the act intended. *Christian v. United States*, App. D.C., 394 A.2d 1 (1978), cert. denied, 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315 (1979).

Whether result intended or not. — An accessory is liable for any criminal act which was the natural and probable consequence of the initial encounter whether he did or did not intend the result accomplished. *Johnson v. United States*, App. D.C., 386 A.2d 710 (1978); *Catlett v. United States*, App. D.C., 545 A.2d 1202 (1988), cert. denied, 488 U.S. 1017, 109 S. Ct. 814, 102 L. Ed. 2d 803 (1989).

But act must be in course of common purpose. — To support conviction of aiding and abetting a felony-murder, the homicide must have been committed in the course of the felony and in furtherance of the common purpose to commit the felony, rather than merely coincidental with it. *United States v. Bolden*, 514 F.2d 1301 (D.C. Cir. 1975).

Although aider and abettor need not have had identical intent as principal at the same time and place. *Stewart v. United States*, App. D.C., 383 A.2d 330 (1978); *Allen v. United States*, App. D.C., 383 A.2d 363 (1978).

And specific concert or communication not necessary. — It is not essential, for purposes of this section, that any specific time or mode of committing the offense shall have been advised or commanded, or, if so, that it shall have been committed in the particular way instigated: nor is it necessary that there shall have been any direct communication between the actual perpetrator and the accessory, who is now a principal. *Maxey v. United States*, 30 App. D.C. 63 (1907).

Nor presence at final criminal act. — Although the defendant was not present when the actual criminal act took place and was a mere artificial principal, not an actual one, he is subject to the same punishment as though he actually had assisted in the final act of larceny. *Weisberg v. United States*, 258 F. 284 (D.C. Cir. 1919).

Elements of aiding and abetting. — In order to aid and abet another to commit a crime it is necessary that a defendant in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, and that he seek by his action to make it succeed. *United States v. McCall*, 460 F.2d 952 (D.C. Cir. 1972); *Quarles v. United States*, App. D.C., 308 A.2d 773 (1973); *Creek v. United States*, App. D.C., 324 A.2d 688 (1974); *Jefferson v. United States*, App. D.C., 463 A.2d 681 (1983).

To sustain conviction of an aider and abettor for commission of the crime, it is only necessary that the defendant was associated with the principal offender in the venture and made a conscious effort to help it succeed. *In re Reeder*, App. D.C., 264 A.2d 893 (1970).

The essential elements of aiding and abetting are: (1) That an offense was committed by someone; (2) that the accused assisted or participated in its commission; and (3) that he did so with guilty knowledge. *Blango v. United States*, App. D.C., 335 A.2d 230 (1975); *United States v. Staten*, 581 F.2d 878 (D.C. Cir. 1978); *Stewart v. United States*, App. D.C., 383 A.2d 330 (1978); *Allen v. United States*, App. D.C., 383 A.2d 363 (1978); *Ellis v. United States*, App. D.C., 395 A.2d 404 (1978), cert. denied, 442 U.S. 913, 99 S. Ct. 2830, 61 L. Ed. 2d 280 (1979); *Glass v. United States*, App. D.C., 395 A.2d 796 (1978); *Jefferson v. United States*, App. D.C., 463 A.2d 681 (1983).

"Knowing" association with criminal venture. — Mere presence at the scene of a crime is not sufficient to convict one of aiding and abetting; what is required is some evidence that the accused knowingly associated himself in some way with the criminal venture, that he participated in it as something that he wished to bring about, and that he sought by his action to make it succeed. *United States v. Lumpkin*, 448 F.2d 1085 (D.C. Cir. 1971).

In order to convict a passenger as an aider and abettor in the unauthorized use of a motor vehicle, the government must establish that he had actual knowledge of the criminal act being committed. *In re D.M.L.*, App. D.C., 293 A.2d 277 (1972).

To be an "aider and abettor" in the unauthorized use of a motor vehicle, a mere passenger must be shown to have had guilty knowledge, and this requires more than showing that he rode in the automobile, pushed the automobile

and repaired a punctured tire. *Kemp v. United States*, 311 F.2d 774 (D.C. Cir. 1962).

"Accomplice". — An accomplice is one who is associated with another, or others, in the commission of a crime. Liability to indictment, under ordinary conditions, is a reasonable test of the legal relation of the party to the crime and its perpetrator. *Yeager v. United States*, 16 App. D.C. 356, cert. denied, 178 U.S. 615, 20 S. Ct. 1031, 44 L. Ed. 1217 (1900).

Anyone knowingly and voluntarily cooperating with, aiding, assisting, advising or encouraging another in the commission of a crime is an accomplice; and this is true, regardless of the degree of his guilt. *Egan v. United States*, 287 F. 958 (D.C. Cir. 1923); *Tomlinson v. United States*, 93 F.2d 652 (D.C. Cir. 1937), cert. denied, 303 U.S. 646, 58 S. Ct. 645, 82 L. Ed. 1107 (1938).

A person cannot aid or abet himself. — To be an aider and abettor, one must aid or abet or procure someone else to commit a substantive offense; one cannot aid or abet himself. *Brooks v. United States*, App. D.C., 599 A.2d 1094 (1991).

Woman upon whom miscarriage is produced in violation of § 22-201 is not accomplice of the person who produces it. *Thompson v. United States*, 30 App. D.C. 352 (1908).

And persons engaged in wagering contests are not accomplices. *Paylor v. United States*, 42 App. D.C. 428, cert. denied, 235 U.S. 704, 35 S. Ct. 209, 59 L. Ed. 434 (1914).

But giver of bribe is accomplice of person bribed. *Egan v. United States*, 287 F. 958 (D.C. Cir. 1923).

And lender of automobile may be deemed accomplice in vehicular homicide. — If the owner of a dangerous instrumentality like an automobile knowingly puts that instrumentality in the immediate control of a careless and reckless driver, sits by his side and permits him, without protest, to carelessly and negligently operate the car so as to cause the death of another, he is as much responsible as the man at the wheel. *Story v. United States*, 16 F.2d 342 (D.C. Cir. 1926), cert. denied, 274 U.S. 739, 47 S. Ct. 576, 71 L. Ed. 1318 (1927).

Withdrawal from venture. — Once a criminal venture begins, a defendant can escape the consequences of the actions of any of the perpetrators only where the testimony and instruction show that before the crime was done he honestly and in good faith withdrew and tried to get away and did not take any part in the offense. *Marcus v. United States*, 86 F.2d 854 (D.C. Cir. 1936).

Evidence insufficient to support defendant's theory of withdrawal from criminal venture. — See *In re D.M.R.*, App. D.C., 373 A.2d 235 (1977); *Catlett v. United States*, App. D.C., 545 A.2d 1202 (1988), cert. denied, 488

U.S. 1017, 109 S. Ct. 814, 102 L. Ed. 2d 803 (1989).

When presence at scene constitutes aiding and abetting. — Presence at scene of crime, while insufficient without more to prove criminal complicity, will constitute aiding and abetting if it designedly encourages the perpetrator, facilitates the unlawful deed or stimulates others to render assistance to the criminal act. *Creek v. United States*, App. D.C., 324 A.2d 688 (1974); *Glass v. United States*, App. D.C., 395 A.2d 796 (1978).

Proof of presence at the scene of a crime plus conduct which designedly encourages or facilitates a crime will support an inference of guilty participation in the crime as an aider and abettor. *Quarles v. United States*, App. D.C., 308 A.2d 773 (1973); *Jefferson v. United States*, App. D.C., 463 A.2d 681 (1983).

An act of relatively slight moment, when coupled with knowledge, may warrant a finding of participation in the crime. *Montgomery v. United States*, App. D.C., 384 A.2d 655 (1978).

But proof of accused's presence at scene of crime alone cannot support a conviction of aiding and abetting the commission of a crime. *Quarles v. United States*, App. D.C., 308 A.2d 773 (1973).

Presence at the scene of a crime, even when coupled with knowledge that a crime is being committed, is generally not enough to constitute aiding and abetting. *Montgomery v. United States*, App. D.C., 384 A.2d 655 (1978).

Identity of principal offender not essential. — There must be a guilty principal before there can be an aider and abettor, but it is not essential that the principal in an operation be identified so long as someone has the status. *United States v. Staten*, 581 F.2d 878 (D.C. Cir. 1978).

Effect of disposition of principal offender. — In this jurisdiction, an aider and abettor is prosecuted as a principal, and conviction of principal offender is not prerequisite to conviction of the aider and abettor. *Bailey v. United States*, 416 F.2d 1110 (D.C. Cir. 1969); *United States v. McCall*, 460 F.2d 952 (D.C. Cir. 1972).

Fact that a jury made no finding as to guilt on a charge of armed robbery of codefendant, who eyewitness testified took money, does not preclude defendant's conviction of armed robbery as an aider and abettor. *Strickland v. United States*, App. D.C., 332 A.2d 746, cert. denied, 423 U.S. 846, 96 S. Ct. 84, 46 L. Ed. 2d 67 (1975).

Even if codefendant was granted a new trial on the ground of insanity and was acquitted on that ground, defendant's conviction for aiding and abetting a felony-murder would not be reversed for that reason, where killing was committed by codefendant in furtherance of a

robbery. *Shanahan v. United States*, App. D.C., 354 A.2d 524 (1976).

Where codefendant was tried on theory he aided and abetted defendant, if the principal defendant was acquitted then codefendant should also have been found not guilty. *United States v. Smith*, 478 F.2d 976 (D.C. Cir. 1973).

Conviction of the principal is simply not a prerequisite to an aiding and abetting conviction. The latter may stand even where the principal is acquitted in a separate trial. *United States v. Richardson*, 817 F.2d 886 (D.C. Cir. 1987).

This section does not forbid prosecution of an aider and abettor for an offense after the principal has been found not guilty of the same offense. *United States v. Edmond*, 924 F.2d 261 (D.C. Cir.), cert. denied, 502 U.S. 838, 112 S. Ct. 125, 116 L. Ed. 2d 92 (1991).

Driver of getaway car is principal as aider and abettor, not accessory. — Defendant who drove the car containing codefendants attempting to escape from scene of robbery was not an accessory after the fact because the robbery was still in progress but, rather, would be a principal as aider and abettor, if anything, so that conviction as accessory after the fact was reversed. *Williams v. United States*, App. D.C., 478 A.2d 1101 (1984).

Abettor chargeable under same information as principal offender. — Under this section, although one may not be the principal actor, he may be charged as a principal under the same information in conjunction with the principal offender for acts of aiding and abetting. *Jack Berman, Inc. v. District of Columbia*, App. D.C., 132 A.2d 147 (1957).

But no error to charge aider and abettor, alone, as principal. — A defendant is not prejudiced by an information charging him alone as a principal where there is adequate evidence to establish that the principal offender committed the violations charged, since this section provides that all persons aiding or abetting a principal are to be charged as principals and not as accessories. *Mason v. United States*, App. D.C., 256 A.2d 565 (1969).

Constructive amendment or variance of indictment. — It is well settled that if an indictment charges an individual as a principal, but the accused is convicted as an aider and abettor, there is not a constructive amendment or variance of the indictment. *Ingram v. United States*, App. D.C., 592 A.2d 992, cert. denied, 502 U.S. 1017, 112 S. Ct. 667, 116 L. Ed. 2d 757 (1991).

Because an aider and abettor may be indicted directly with the commission of the substantive crime, and the charge may be supported by proof that he only aided and abetted in its commission, there will be no variance if the accused is charged as principal but the proof at trial shows he was an aider and abettor.

Ingram v. United States, App. D.C., 592 A.2d 992, cert. denied, 502 U.S. 1017, 112 S. Ct. 667, 116 L. Ed. 2d 757 (1991).

Question of aiding and abetting for jury. — In murder prosecution against two defendants, one of whom shot the victim, whether the codefendant had aided and abetted the offense was a question for the jury under the evidence. *United States v. Clayborne*, 509 F.2d 473 (D.C. Cir. 1974).

Jury instructions. — A special unanimity instruction was not required since no jurors may have found defendant guilty only of aiding and abetting rather than as a principal; there was only one course of conduct and it was sufficient that the jury agreed unanimously that defendant participated in the offense, whether as an aider or principal. *Simms v. United States*, App. D.C., 634 A.2d 442 (1993).

Evidence sufficient to sustain conviction for aiding and abetting assault. — See *Rogers v. United States*, App. D.C., 174 A.2d 356 (1961); *United States v. Prater*, 462 F.2d 292 (D.C. Cir. 1972); *In re T.J.W.*, App. D.C., 294 A.2d 174 (1972); *Jones v. United States*, App. D.C., 386 A.2d 308 (1978), cert. denied, 444 U.S. 925, 100 S. Ct. 263, 62 L. Ed. 2d 181 (1979); *Johnson v. United States*, App. D.C., 386 A.2d 710 (1978).

Evidence sufficient to sustain conviction for aiding and abetting assault with dangerous weapon. — See *Murchison v. United States*, App. D.C., 486 A.2d 77 (1984).

Evidence sufficient to support conviction as aider and abettor in assault with intent to commit robbery. — See *In re Reeder*, App. D.C., 264 A.2d 893 (1970).

Evidence sufficient to support conviction for aiding and abetting assault and attempted petit larceny. — See *Williams v. United States*, App. D.C., 190 A.2d 269 (1963).

Evidence sufficient to prove accessory before attempted bribery. — See *Ladrey v. United States*, 155 F.2d 417 (D.C. Cir.), cert. denied, 329 U.S. 723, 67 S. Ct. 68, 91 L. Ed. 627 (1946).

Evidence sufficient to sustain conviction for aiding and abetting attempted first degree burglary. — See *Harris v. United States*, App. D.C., 377 A.2d 34 (1977).

Evidence sufficient to sustain conviction for aiding and abetting act of carnal knowledge of 13-year-old girl. — See *In re J.W.Y.*, App. D.C., 363 A.2d 674 (1976).

Evidence sufficient to support conviction for aiding and abetting forgery. — See *United States v. Conner*, 462 F.2d 296 (D.C. Cir. 1972).

Evidence sufficient to sustain conviction for aiding and abetting housebreaking and larceny. — See *Lanham v. United States*, 185 F.2d 435 (D.C. Cir. 1950).

Evidence sufficient to sustain conviction for aiding and abetting possession with intent to distribute. — See *United States v. Staten*, 581 F.2d 878 (D.C. Cir. 1978).

Evidence sufficient to sustain conviction for aiding and abetting robbery. — See *Creek v. United States*, App. D.C., 324 A.2d 688 (1974); *Glass v. United States*, App. D.C., 395 A.2d 796 (1978).

See *Kelly v. United States*, App. D.C., 639 A.2d 86 (1994).

Evidence sufficient to support conviction for aiding and abetting armed robbery. *Hordge v. United States*, App. D.C., 545 A.2d 1249 (1988).

Evidence sufficient to sustain conviction for aiding and abetting robbery and felony-murder. — See *Shanahan v. United States*, App. D.C., 354 A.2d 524 (1976); *Jefferson v. United States*, App. D.C., 463 A.2d 681 (1983).

Evidence sufficient to sustain conviction for and abetting second degree murder. — See *United States v. Clayborne*, 509 F.2d 473 (D.C. Cir. 1974); *Ellis v. United States*, App. D.C., 395 A.2d 404 (1978), cert. denied, 442 U.S. 913, 99 S. Ct. 2830, 61 L. Ed. 2d 280 (1979).

Evidence sufficient to sustain conviction as aider and abettor in unlawful sales and deliveries of drugs. — See *Mason v. United States*, App. D.C., 256 A.2d 565 (1969).

Evidence not sufficient to sustain conviction for aiding and abetting petit larceny. — See *Williams v. United States*, App. D.C., 254 A.2d 722 (1969); *Quarles v. United States*, App. D.C., 308 A.2d 773 (1973).

Evidence not sufficient to sustain conviction for aiding and abetting robbery. — See *Bailey v. United States*, 416 F.2d 1110 (D.C. Cir. 1969).

Evidence insufficient to support conviction for aiding and abetting unauthorized operation of vehicle for hire. — See *Sellers v. District of Columbia*, App. D.C., 143 A.2d 96 (1958).

Evidence insufficient to sustain conviction as aider and abettor in unauthorized use of motor vehicle. — See *Kemp v. United States*, 311 F.2d 774 (D.C. Cir. 1962); *In re D.M.L.*, App. D.C., 293 A.2d 277 (1972).

Evidence insufficient to support conviction of complicity in obstruction of justice. — Evidence was insufficient to support conviction for obstruction of justice where evidence underlying that charge rested upon asserted complicity in threatening victim by a letter and information in the letter itself could have been

known by other's than defendant. *Green v. United States*, App. D.C., 651 A.2d 817 (1994).

Cited in *Polen v. United States*, 41 App. D.C. 4 (1913); *Dane v. United States*, 18 F.2d 811 (D.C. Cir.), cert. denied, 275 U.S. 538, 48 S. Ct. 35, 72 L. Ed. 413 (1927); *Frend v. United States*, 100 F.2d 691 (D.C. Cir. 1938), cert. denied, 306 U.S. 640, 59 S. Ct. 488, 83 L. Ed. 1040 (1939); *Warde v. United States*, 158 F.2d 651 (D.C. Cir. 1946); *Hall v. United States*, 168 F.2d 161 (D.C. Cir.), cert. denied, 334 U.S. 853, 68 S. Ct. 1509, 92 L. Ed. 1775 (1948); *Collazo v. United States*, 196 F.2d 573 (D.C. Cir.), cert. denied, 343 U.S. 968, 72 S. Ct. 1065, 96 L. Ed. 1364 (1952); *Cooper v. United States*, App. D.C., 123 A.2d 918 (1956); *Smith v. United States*, 306 F.2d 286 (D.C. Cir. 1962); *United States v. Irving*, 437 F.2d 649 (D.C. Cir. 1970); *United States v. Carter*, 445 F.2d 669 (D.C. Cir. 1971), cert. denied, 405 U.S. 932, 92 S. Ct. 988, 30 L. Ed. 2d 806 (1972); *United States v. Williams*, 463 F.2d 958 (D.C. Cir. 1972); *United States v. Thompson*, 463 F.2d 1258 (D.C. Cir. 1972); *United States v. Hawkins*, 480 F.2d 1151 (D.C. Cir. 1973); *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973); *Payton v. United States*, App. D.C., 305 A.2d 512 (1973); *United States v. Sherpix, Inc.*, 512 F.2d 1361 (D.C. Cir. 1975); *United States v. Jones*, 517 F.2d 176 (D.C. Cir. 1975); *Austin v. United States*, App. D.C., 356 A.2d 648 (1976); *Byrd v. United States*, App. D.C., 364 A.2d 1215 (1976); *Barker v. United States*, App. D.C., 373 A.2d 1215 (1977); *Dean v. United States*, App. D.C., 377 A.2d 423 (1977); *Stewart v. United States*, App. D.C., 383 A.2d 330 (1978); *Waller v. United States*, App. D.C., 389 A.2d 801 (1978), cert. denied, 446 U.S. 901, 100 S. Ct. 1824, 64 L. Ed. 2d 253 (1980); *Hackney v. United States*, App. D.C., 389 A.2d 1336 (1978), cert. denied, 439 U.S. 1132, 99 S. Ct. 1054, 59 L. Ed. 2d 95 (1979); *In re R.A.B.*, App. D.C., 399 A.2d 81 (1979); *United States v. Schiller*, App. D.C., 424 A.2d 51 (1980), cert. denied, 451 U.S. 964, 101 S. Ct. 2035, 68 L. Ed. 2d 341 (1981); *United States v. Raper*, 676 F.2d 841 (D.C. Cir. 1982); *United States v. Venable*, 111 WLR 2241 (Super. Ct. 1983); *Battle v. United States*, App. D.C., 515 A.2d 1120 (1986); *Abrams v. United States*, App. D.C., 531 A.2d 964 (1987); *Cain v. United States*, App. D.C., 532 A.2d 1001 (1987); *United States v. McNeil*, 911 F.2d 768 (D.C. Cir. 1990); *Lumpkin v. United States*, App. D.C., 586 A.2d 701, cert. denied, 502 U.S. 849, 112 S. Ct. 151, 116 L. Ed. 2d 116 (1991); *Robinson v. United States*, App. D.C., 608 A.2d 115 (1992); *Brown v. United States*, App. D.C., 619 A.2d 1180 (1992); *United States v. Lloyd*, 71 F.3d 408 (D.C. Cir. 1995).

§ 22-105a. Conspiracy to commit crime.

(a) If 2 or more persons conspire either to commit a criminal offense or to defraud the District of Columbia or any court or agency thereof in any manner or for any purpose, each shall be fined not more than \$10,000 or imprisoned not more than 5 years, or both, except that if the object of the conspiracy is a criminal offense punishable by less than 5 years, the maximum penalty for the conspiracy shall not exceed the maximum penalty provided for that offense.

(b) No person may be convicted of conspiracy unless an overt act is alleged and proved to have been committed by 1 of the conspirators pursuant to the conspiracy and to effect its purpose.

(c) When the object of a conspiracy contrived within the District of Columbia is to engage in conduct in a jurisdiction outside the District of Columbia which would constitute a criminal offense under an act of Congress applicable exclusively to the District of Columbia if performed therein, the conspiracy is a violation of this section if:

(1) Such conduct would also constitute a crime under the laws of the other jurisdiction if performed therein; or

(2) Such conduct would constitute a criminal offense under an act of Congress exclusively applicable to the District of Columbia even if performed outside the District of Columbia.

(d) A conspiracy contrived in another jurisdiction to engage in conduct within the District of Columbia which would constitute a criminal offense under an act of Congress exclusively applicable to the District of Columbia if performed within the District of Columbia is a violation of this section when an overt act pursuant to the conspiracy is committed within the District of Columbia. Under such circumstances, it is immaterial and no defense to a prosecution for conspiracy that the conduct which is the object of the conspiracy would not constitute a crime under the laws of the other jurisdiction. (Mar. 3, 1901, ch. 854, § 908A; July 29, 1970, 84 Stat. 599, Pub. L. 91-358, title II, § 202; 1973 Ed., § 22-105a.)

Applicability of subsection (b). — Subsection (b) is inapplicable to a discussion of the scope of the coconspirator statement rule. An overt act is necessary for conviction, but a conspiracy need not even be alleged for a court to apply Fed.R.Evid. 801(d)(2)(E) regarding the admissibility of a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. *Bellanger v. United States*, App. D.C., 548 A.2d 501 (1988).

Conviction under District and federal statute prohibited. — A defendant may be simultaneously charged in an indictment with violation of this section and a similar federal statute, but the defendant cannot be convicted and sentenced under both statutes. *United States v. Lewis*, 716 F.2d 16 (D.C. Cir.), cert. denied, 464 U.S. 996, 104 S. Ct. 492, 78 L. Ed. 2d 686 (1983).

Guilty plea to conspiracy no bar to hearing on substantive crime. — A plea of guilty

to conspiracy to commit an abortion does not insulate an accused from inquiry in a presentence hearing as to the extent of his conduct in an abortion, notwithstanding the contention that the determination of guilt of a different offense has already resulted. *Warren v. United States*, App. D.C., 310 A.2d 228 (1973).

Conspiracy to defraud District of Columbia includes conspiracy to defraud the District of Columbia of its lawful governmental functions. *United States v. Lewis*, 716 F.2d 16 (D.C. Cir.), cert. denied, 464 U.S. 996, 104 S. Ct. 492, 78 L. Ed. 2d 686 (1983).

Evidence sufficient to sustain conviction for assault with deadly weapon in course of conspiracy. — See *Jones v. United States*, App. D.C., 386 A.2d 308 (1978), cert. denied, 444 U.S. 925, 100 S. Ct. 263, 62 L. Ed. 2d 181 (1979).

Evidence sufficient to sustain conviction for conspiracy to murder, assault, rob

and burglarize. — See *Christian v. United States*, App. D.C., 394 A.2d 1 (1978), cert. denied, 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315 (1979).

Evidence insufficient to support multiple conspiracy instruction. — See *Khaalis v. United States*, App. D.C., 408 A.2d 313 (1979), cert. denied, 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781 (1980).

Cited in *In re A.S.W.*, App. D.C., 391 A.2d 1385 (1978); *Galison v. District of Columbia*, App. D.C., 402 A.2d 1263 (1979); *United States v. Nunzio*, App. D.C., 430 A.2d 1372 (1981); *Hazel v. United States*, App. D.C., 599 A.2d 38 (1991), cert. denied, 506 U.S. 939, 113 S. Ct. 374, 121 L. Ed. 2d 286 (1992); *McClain v. United States*, App. D.C., 601 A.2d 80 (1992).

§ 22-106. Accessories after the fact.

Whoever shall be convicted of being an accessory after the fact to any crime punishable by death shall be punished by imprisonment for not more than 20 years. Whoever shall be convicted of being accessory after the fact to any crime punishable by imprisonment shall be punished by a fine or imprisonment, or both, as the case may be, not more than ½ the maximum fine or imprisonment, or both, to which the principal offender may be subjected. (Mar. 3, 1901, 31 Stat. 1337, ch. 854, § 909; 1973 Ed., § 22-106.)

Accessory after the fact defined. — An accessory after the fact is one who, with knowledge of the principal crime, renders aid to the guilty actor. *Clark v. United States*, App. D.C., 418 A.2d 1059 (1980).

An accessory after the fact is one who assists a principal to avoid apprehension or punishment. *Ruffin v. United States*, App. D.C., 524 A.2d 685 (1987), cert. denied, 486 U.S. 1057, 108 S. Ct. 2827, 100 L. Ed. 2d 927 (1988).

This section has modified common law definition to the extent that one can be an accessory after the fact to any criminal offense subject to a fine or punishment rather than connecting the offense only to felonies. *Clark v. United States*, App. D.C., 418 A.2d 1059 (1980).

Underlying crime need not violate District law. — The crime underlying the charge of accessory after the fact need not violate a law of the District of Columbia; hence, a District of Columbia indictment charging defendants with being accessories after the fact of an escape from lawful custody that took place in Maryland was proper where defendants concealed escapee in the District. *United States v. Butler*, 112 WLR 9 (Super. Ct. 1984).

May be convicted though present before and during crime. — A defendant may be convicted as an accessory after the fact, even though he was present before, during, and after the crime. *Smith v. United States*, 306 F.2d 286 (D.C. Cir. 1962).

Proof of conviction of underlying offender not necessary. — The government is not required to prove that the underlying offender has been convicted, but only that a separate and distinct offense has been committed. *United States v. Butler*, 112 WLR 9 (Super. Ct. 1984).

Government's evidence must establish that the defendant had knowledge of another's

participation in a crime and that with that knowledge the defendant aided or assisted the other with specific intent to help him evade apprehension or punishment. *Butler v. United States*, App. D.C., 481 A.2d 431 (1984), cert. denied, 470 U.S. 1029, 105 S. Ct. 1398, 84 L. Ed. 2d 786 (1985).

Accessory must be distinctly charged in indictment. — The crime of being an accessory after the fact is fundamentally dissimilar from that of a principal and must be distinctly charged in the indictment. *Williams v. United States*, App. D.C., 478 A.2d 1101 (1984).

Misprision of felony distinguished from accessory after the fact. — The offense of misprision of felony makes unlawful the aiding or assisting of any person suspected of a crime to escape full judicial examination by the withholding of any information about a felony or other unlawful act and must be distinguished from the offense of accessory after the fact, which requires an act of assistance by the alleged accessory. *Butler v. United States*, App. D.C., 481 A.2d 431 (1984), cert. denied, 470 U.S. 1029, 105 S. Ct. 1398, 84 L. Ed. 2d 786 (1985).

"Crime punishable by death" construed. — The phrase "crime punishable by death" in this section is still viable as a shorthand reference to a category of particularly serious offenses in which first degree murder is included, notwithstanding decisions holding the death penalty statute unconstitutional. *Butler v. United States*, App. D.C., 481 A.2d 431 (1984), cert. denied, 470 U.S. 1029, 105 S. Ct. 1398, 84 L. Ed. 2d 786 (1985).

Driver of getaway car is principal as aider and abettor, not accessory. — Defendant who drove the car containing codefendants attempting to escape from scene of robbery was not an accessory after the fact because

the robbery was still in progress but, rather, would be a principal as aider and abettor, if anything, so that conviction as accessory after the fact was reversed. *Williams v. United States*, App. D.C., 478 A.2d 1101 (1984).

Passenger in getaway car held not accessory. — Defendant who was a passenger in the getaway car driven by the principal offender could not be an accessory after the fact to robbery since any act which purportedly aided the principal's escape occurred during the principal's immediate flight from scene of robbery and while the principal was being pursued, so that the robbery was still in progress. *Fields v. United States*, App. D.C., 484 A.2d 570 (1984), cert. denied, 471 U.S. 1067, 105 S. Ct. 2144, 85 L. Ed. 2d 501 (1985).

Evidence sufficient to support defendant's conviction as an accessory after the fact to simple assault. *Ruffin v. United States*, App. D.C., 524 A.2d 685 (1987), cert. denied, 486 U.S. 1057, 108 S. Ct. 2827, 100 L. Ed. 2d 927 (1988).

Evidence sufficient for arrest as accessory after the fact. — See *United States v.*

Honesty, 459 F.2d 1279 (D.C. Cir. 1971); *In re K.W.G.*, App. D.C., 374 A.2d 852 (1977).

Evidence insufficient to sustain conviction as accessory after fact of armed robbery. — See *Clark v. United States*, App. D.C., 418 A.2d 1059 (1980).

Evidence insufficient to sustain conviction as accessory after fact of murder or assault. — See *Outlaw v. United States*, App. D.C., 632 A.2d 408 (1993), cert. denied, — U.S. —, 114 S. Ct. 1326, 127 L. Ed. 2d 674 (1994).

Cited in *United States v. Irving*, 437 F.2d 649 (D.C. Cir. 1970); *Shanahan v. United States*, App. D.C., 354 A.2d 524 (1976); *United States v. Day*, 591 F.2d 861 (D.C. Cir. 1978); *McBride v. United States*, App. D.C., 393 A.2d 123 (1978), cert. denied, 440 U.S. 927, 99 S. Ct. 1260, 59 L. Ed. 2d 482 (1979); *Wilson v. United States*, App. D.C., 444 A.2d 25 (1982); *Jefferson v. United States*, App. D.C., 463 A.2d 681 (1983); *Stevenson v. United States*, App. D.C., 522 A.2d 1280 (1987); *Abrams v. United States*, App. D.C., 531 A.2d 964 (1987); *Morris v. United States*, App. D.C., 548 A.2d 1383 (1988); *In re M.A.M.*, 124 WLR 173 (Super. Ct. 1995).

§ 22-107. Punishment for offenses not covered by provisions of Code.

Whoever shall be convicted of any criminal offense not covered by the provisions of any section of this Code, or of any general law of the United States not locally inapplicable in the District of Columbia, shall be punished by a fine not exceeding \$1,000 or by imprisonment for not more than 5 years, or both. (Mar. 3, 1901, 31 Stat. 1337, ch. 854, § 910; 1973 Ed., § 22-107.)

Purpose of section. — This section is intended to supplement, and not supersede or modify, specific statutory provisions. *Fletcher v. United States*, 42 App. D.C. 53 (1914), cert. denied, 235 U.S. 706, 35 S. Ct. 283, 59 L. Ed. 434 (1915).

Offense of keeping disorderly house is punishable under this section. *Palmer v. Lenovitz*, 35 App. D.C. 303 (1910).

Conviction for negligent escape, punishable under this section, invokes the punish-

ment of a felony, although it was apparently classified as a misdemeanor at common law. *United States v. Davis*, 167 F.2d 228 (D.C. Cir.), cert. denied, 334 U.S. 849, 68 S. Ct. 1501, 92 L. Ed. 1772 (1948).

Cited in *Logan v. United States*, App. D.C., 483 A.2d 664 (1984); *United States v. McNeil*, 911 F.2d 768 (D.C. Cir. 1990); *United States v. Hobbs*, 119 WLR 673 (Super. Ct. 1991).

§ 22-108. Offenses committed beyond District.

Any person who by the commission outside of the District of Columbia of any act which, if committed within the District of Columbia, would be a criminal offense under the laws of said District, thereby obtains any property or other thing of value, and is afterwards found with any such property or other such thing of value in his or her possession in said District, or who brings any such property or other such thing of value into said District, shall, upon conviction, be punished in the same manner as if said act had been committed wholly within said District. (Mar. 3, 1901, ch. 854, § 836a; Dec. 21, 1911, 37 Stat. 45,

ch. 2; 1973 Ed., § 22-108; May 21, 1994, D.C. Law 10-119, § 2(c), 41 DCR 1639.)

Cross references. — As to receiving stolen goods, see §§ 22-3831 and 22-3832.

Effect of amendments. — D.C. Law 10-119 substituted "his or her" for "his."

Legislative history of Law 10-119. — See note to § 22-104.

Convictions for burglary and grand larceny are mutually exclusive with conviction

under this section for receiving stolen property and bringing it into the District. *United States v. Lemonakis*, 485 F.2d 941 (D.C. Cir. 1973), cert. denied, 415 U.S. 989, 94 S. Ct. 1586, 39 L. Ed. 2d 885 (1974).

Cited in *Arnstein v. United States*, 296 F. 946 (D.C. Cir.), cert. denied, 264 U.S. 595, 44 S. Ct. 454, 68 L. Ed. 867 (1924).

§ 22-109. Prosecutions.

All prosecutions for violations of § 22-1121 or any of the provisions of any of the laws or ordinances provided for by this act shall be conducted in the name of and for the benefit of the District of Columbia, and in the same manner as provided by law for the prosecution of offenses against the laws and ordinances of the said District. Any person convicted of any violation of § 22-1121 or any of the provisions of this act, and who shall fail to pay the fine or penalty imposed, or to give security where the same is required, shall be committed to the Workhouse of the District of Columbia for a term not exceeding 6 months for each and every offense. The second sentence of this section shall not apply with respect to any violation of § 22-1112(b). (July 29, 1892, 27 Stat. 325, ch. 320, § 18; June 29, 1953, 67 Stat. 93, 98, ch. 159, §§ 202 (a) (2), 211 (b); 1973 Ed., § 22-109.)

Cross references. — As to conduct of prosecutions, see § 23-101.

As to Alcoholic Beverage Control Act, see § 25-101 et seq.

As to adulteration of food and drugs, see § 33-101 et seq.

As to Uniform Narcotic Drug Act, see § 33-501 et seq.

References in text. — The term, "this act," referred to twice in this section, refers to the Act of July 29, 1892, 27 Stat. 325, ch. 320.

Cited in *Smith v. District of Columbia*, 387 F.2d 233 (D.C. Cir. 1967).

CHAPTER 2. ABORTION.

Sec.

22-201. Definition and penalty.

§ 22-201. Definition and penalty.

Whoever, by means of any instrument, medicine, drug or other means whatever, procures or produces, or attempts to procure or produce an abortion or miscarriage on any woman, unless the same were done as necessary for the preservation of the mother's life or health and under the direction of a competent licensed practitioner of medicine, shall be imprisoned in the penitentiary not less than 1 year or not more than 10 years; or if the death of the mother results therefrom, the person procuring or producing, or attempting to procure or produce the abortion or miscarriage shall be guilty of second degree murder. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 809; June 29, 1953, 67 Stat. 93, ch. 159, § 203; 1973 Ed., § 22-201; May 10, 1989, D.C. Law 7-231, § 28, 36 DCR 492.)

Section references. — This section is referred to in § 11-502.

Legislative history of Law 7-231. — Law 7-231, the "Technical Amendments Act of 1988," was introduced in Council and assigned Bill No. 7-586, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 29, 1988 and December 13, 1988, respectively. Signed by the Mayor on January 6, 1989, it was assigned Act No. 7-285 and transmitted to both Houses of Congress for its review.

This section is not unconstitutionally vague. *United States v. Vuitch*, 402 U.S. 62, 91 S. Ct. 1294, 28 L. Ed. 2d 601 (1971).

Prosecution must prove abortion not justified. — In a prosecution under this section, the burden is on the prosecution to plead and prove that an abortion was not necessary for the preservation of the mother's life or health. *United States v. Vuitch*, 402 U.S. 62, 91 S. Ct. 1294, 28 L. Ed. 2d 601 (1971).

"Health" defined. — Within this section, "health" is the state of being sound in body or mind and includes psychological as well as physical well-being. *United States v. Vuitch*, 402 U.S. 62, 91 S. Ct. 1294, 28 L. Ed. 2d 601 (1971).

History of mental defects not necessary for therapeutic abortion. — This section does not preclude a District hospital from making available its facilities for the performance of therapeutic abortions for mental health reasons whether or not the patient has had a previous history of mental defects. *Doe v. General Hosp.*, 313 F. Supp. 1170 (D.D.C. 1970); *United States v. Vuitch*, 402 U.S. 62, 91 S. Ct. 1294, 28 L. Ed. 2d 601 (1971).

May be immaterial whether or not woman pregnant. — In a prosecution for

using instruments upon and administering drugs to a pregnant woman, with the intent to procure her miscarriage, a charge of the court that it is immaterial whether or not the woman was pregnant, if at the time the defendant believed that she was pregnant, is not erroneous. *Peckham v. United States*, 226 F.2d 34 (D.C. Cir.), cert. denied, 350 U.S. 912, 76 S. Ct. 195, 100 L. Ed. 800 (1955).

Attempt deemed offense. — This section does not necessarily contemplate an actual miscarriage by the woman, as the offense is complete when an attempt to procure a miscarriage is made, regardless of whether it results in an actual miscarriage of the pregnant woman or not. *Crichton v. United States*, 92 F.2d 224 (D.C. Cir.), cert. denied, 302 U.S. 702, 58 S. Ct. 22, 82 L. Ed. 542 (1937).

Woman not accomplice. — This section applies to the person or persons committing the act which produces the miscarriage, and not to the woman upon whom it is committed, notwithstanding that it may be done with her knowledge and consent; and, not being liable to indictment, she may not be an accomplice in the legal sense. *Maxey v. United States*, 30 App. D.C. 63 (1907); *Thompson v. United States*, 30 App. D.C. 352 (1908).

Evidence sufficient to sustain conviction for producing miscarriage or abortion. — See *Harrod v. United States*, 29 F.2d 454 (D.C. Cir. 1928); *Hart v. United States*, 105 F.2d 792 (D.C. Cir. 1939); *Miller v. United States*, 169 F.2d 967 (D.C. Cir. 1948).

Cited in *Rowley v. Welch*, 114 F.2d 499 (D.C. Cir. 1940); *Offutt v. United States*, 348 U.S. 11, 75 S. Ct. 11, 99 L. Ed. 11 (1954); *Peckham v. United States*, 210 F.2d 693 (D.C. Cir. 1953); *Harper v. United States*, 239 F.2d 945 (D.C. Cir.

1956); *Ladrey v. Commission on Licensure to Practice Healing Art*, 261 F.2d 68 (D.C. Cir.), cert. denied, 358 U.S. 920, 79 S. Ct. 288, 3 L.

Ed. 2d 239 (1958); *Copes v. United States*, 345 F.2d 723 (D.C. Cir. 1964); *Warren v. United States*, App. D.C., 310 A.2d 228 (1973).

CHAPTER 3. ADULTERY.

Sec.

22-301. Definition and penalty.

§ 22-301. Definition and penalty.

Whoever commits adultery in the District shall, on conviction thereof, be punished by a fine not exceeding \$500, or by imprisonment not exceeding 180 days, or both; and when the act is committed between a married person and a person who is unmarried both parties to such act shall be deemed guilty of adultery. (Mar. 3, 1901, 31 Stat. 1332, ch. 854, § 874; 1973 Ed., § 22-301; May 21, 1994, D.C. Law 10-119, § 2(d), 41 DCR 1639; Aug. 20, 1994, D.C. Law 10-151, § 105(b), 41 DCR 2608.)

Effect of amendments. — D.C. Law 10-119 rewrote the clause following the semicolon.

D.C. Law 10-151 substituted "180 days" for "1 year."

Emergency act amendments. — For temporary amendment of section, see § 105(b) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-119. — Law 10-119, the "Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Legislative history of Law 10-151. — Law 10-151, the "Omnibus Criminal Justice Reform Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings

on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

One convicted of adultery should be sentenced under this section and not under former § 316 of the federal penal code (18 U.S.C. § 516). *Kleindienst v. United States*, 48 App. D.C. 190 (1918).

On an indictment for adultery which under the District Code is a misdemeanor and under the federal penal code a felony, the accused, on his conviction, should be sentenced under the former and not the latter. *O'Brien v. United States*, 99 F.2d 368 (D.C. Cir.), cert. denied, 305 U.S. 562, 59 S. Ct. 95, 83 L. Ed. 354 (1938).

Section inapplicable to unmarried women. — If an act is committed by a woman while unmarried, the act is not indictable; although such an act is indictable, if committed by her while married. *O'Neil v. O'Neil*, 299 F. 914 (D.C. Cir. 1924).

Cited in *Hackes v. Hackes*, App. D.C., 446 A.2d 396 (1982).

CHAPTER 4. ARSON.

Sec.

22-401. Definition and penalty.

22-402. Burning one's own property with intent to defraud or injure another.

22-403. Malicious burning, destruction, or injury of another's property.

Sec.

22-404. Malicious burning of fences, woods, crops.

§ 22-401. Definition and penalty.

Whoever shall maliciously burn or attempt to burn any dwelling, or house, barn, or stable adjoining thereto, or any store, barn, or outhouse, or any shop, office, stable, store, warehouse, or any other building, or any steamboat, vessel, canal boat, or other watercraft, or any railroad car, the property, in whole or in part, of another person, or any church, meetinghouse, schoolhouse, or any of the public buildings in the District, belonging to the United States or to the District of Columbia, shall suffer imprisonment for not less than 1 year nor more than 10 years. (Mar. 3, 1901, 31 Stat. 1323, ch. 854, § 820; 1973 Ed., § 22-401.)

Cross references. — As to kindling of bonfires, see § 22-1113.

Section references. — This section is referred to in §§ 22-2401 and 23-546.

Arson involves conduct endangering human life and offending security of habitation or occupancy. Logan v. United States, App. D.C., 460 A.2d 34 (1983).

There is no value requirement for arson. In re W.B.W., App. D.C., 397 A.2d 143 (1979).

One burning a dwelling house occupied in part by that person and in part by another, with intent to defraud an insurance company, is guilty of arson. Posey v. United States, 26 App. D.C. 302 (1905).

Malicious burning not lesser included offense. — Although malicious burning is a related offense, it is not a lesser included offense of arson, and a petition charging one with arson gives no notice that he may face a charge of malicious burning. In re W.B.W., App. D.C., 397 A.2d 143 (1979).

Malicious destruction of property not lesser included offense. — There is no "inherent" relationship between malicious destruction of property and arson to warrant merger of malicious destruction of property as a lesser included offense of arson, i.e., they do not protect the same interests nor are they so related that proof of malicious destruction of property is necessarily presented as part of the showing of the commission of arson. Logan v. United States, App. D.C., 460 A.2d 34 (1983).

Proof of malicious destruction of property is not necessarily presented as part of showing of arson. Logan v. United States, App. D.C., 460 A.2d 34 (1983).

Evidence sustained conviction for arson committed by malicious burning. — Lichtenwalter v. United States, 190 F.2d 36 (D.C. Cir. 1951); Chaconas v. United States, App. D.C., 326 A.2d 792 (1974).

Single out-of-court identification held insufficient. — Single out-of-court identification of juvenile arson defendant which consisted of testimony concerning the viewing of a photographic array and which established only that the witness picked out three photographs, one of which depicted defendant because he "looked familiar" from the night of the fire, could not suffice, without more, to prove guilt beyond a reasonable doubt. In re R.H.M., App. D.C., 630 A.2d 705 (1993).

Evidence insufficient to support conviction for arson. — See United States v. Carter, 522 F.2d 666 (D.C. Cir. 1975).

Cited in Parlton v. United States, 75 F.2d 772 (D.C. Cir. 1935); Green v. United States, 218 F.2d 856 (D.C. Cir. 1955); Cureton v. United States, 396 F.2d 671 (D.C. Cir. 1968); United States v. Barnes, 464 F.2d 828 (D.C. Cir. 1972), cert. denied, 410 U.S. 986, 93 S. Ct. 1514, 36 L. Ed. 2d 183 (1973); Barrett v. United States, App. D.C., 377 A.2d 62 (1977); Smith v. United States, App. D.C., 379 A.2d 1166 (1977); Gaither v. United States, App. D.C., 391 A.2d 1364 (1978); Hallman v. United States, App. D.C., 410 A.2d 215 (1979); Perkins v. United States, App. D.C., 446 A.2d 19 (1982); Wells v. United States, App. D.C., 469 A.2d 1248 (1983); Carter v. United States, App. D.C., 531 A.2d 956 (1987); Shepard v. United States, App. D.C., 538 A.2d 1115 (1988); United States v. Peoples, 116 WLR 1161 (Super. Ct. 1988).

§ 22-402. Burning one's own property with intent to defraud or injure another.

Whoever maliciously burns or sets fire to any dwelling, shop, barn, stable, store, or warehouse or other building, or any steamboat, vessel, canal boat, or other watercraft, or any goods, wares, or merchandise, the same being his own property, in whole or in part, with intent to defraud or injure any other person, shall be imprisoned for not more than 15 years. (Mar. 3, 1901, 31 Stat. 1323, ch. 854, § 821; 1973 Ed., § 22-402.)

Cross references. — As to fraud, see § 22-3821.

Section references. — This section is referred to in §§ 22-2401 and 23-546.

Evidence sufficient to sustain conviction for burning of own property with intent to defraud. — See *Chaconas v. United States*, App. D.C., 326 A.2d 792 (1974).

§ 22-403. Malicious burning, destruction, or injury of another's property.

Whoever maliciously injures or breaks or destroys, or attempts to injure or break or destroy, by fire or otherwise, any public or private property, whether real or personal, not his or her own, of the value of \$200 or more, shall be fined not more than \$5,000 or shall be imprisoned for not more than 10 years, or both, and if the value of the property be less than \$200 shall be fined not more than \$1,000 or imprisoned for not more than 180 days, or both. (Mar. 3, 1901, 31 Stat. 1327, ch. 854, § 848; Aug. 12, 1937, 50 Stat. 629, ch. 599; Nov. 8, 1965, 79 Stat. 1307, Pub. L. 89-347, § 1; 1973 Ed., § 22-403; May 21, 1994, D.C. Law 10-119, § 2(e), 41 DCR 1639; Aug. 20, 1994, D.C. Law 10-151, § 105(c), 41 DCR 2608.)

Section references. — This section is referred to in § 23-546.

Effect of amendments. — D.C. Law 10-119 substituted "his or her" for "his."

D.C. Law 10-151 substituted "180 days" for "1 year."

Emergency act amendments. — For temporary amendment of section, see § 105(c) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-119. — Law 10-119, the "Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Legislative history of Law 10-151. — Law 10-151, the "Omnibus Criminal Justice Reform Amendment Act of 1994," was introduced in

Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

Injury to property. — Changing the appearance of someone else's property, without consent, especially by splattering a staining substance such as blood on it, injures that property. *United States v. Berberich*, 120 WLR 537 (Super. Ct. 1992).

Property protected from injury or harm. — The offense of malicious destruction of property protects against injury or harm merely to property. *Logan v. United States*, App. D.C., 460 A.2d 34 (1983).

Because redundancy in criminal statutes is permissible, it does not matter that blood stains injure property for the purposes of both this section and § 22-3112.1. *United States v. Berberich*, 120 WLR 537 (Super. Ct. 1992).

Elements of malicious destruction of property are that the defendant injured or broke or destroyed or attempted to injure, break or destroy property; that the property was not the defendant's; that the defendant did so maliciously with intent to injure, break or destroy the property and for a bad or evil purpose, and not merely negligently or accidentally; and that the property was of a value of \$200 or more. *Nichols v. United States*, App. D.C., 343 A.2d 336 (1975).

The misdemeanor charge of destruction of property under this section requires proof of 4 elements: (1) That defendant injured, broke, or destroyed, or attempted to injure, break, or destroy property, (2) that the property was not the defendant's property, (3) that the property was of some value, and (4) that the defendant acted maliciously; that is, either with intent to injure or destroy the property, or with a conscious disregard of a known and substantial risk that injury would result from her actions. *United States v. Berberich*, 120 WLR 537 (Super. Ct. 1992).

Element of value is hallmark of malicious burning. In re W.B.W., App. D.C., 397 A.2d 143 (1979).

"Value" defined. — Within provisions of this section, the word "value" refers to the fair market value of the object or entity involved immediately before the crime occurred regardless of whether there is destruction of an entire item of property or only injury which falls short of total destruction. *Nichols v. United States*, App. D.C., 343 A.2d 336 (1975).

Value of reparable, damaged property measured by cost of reasonable repair. — When reparable damage or destruction is caused to a portion or portions of a greater whole, the value of the property damaged or destroyed is to be measured by the reasonable cost of the repairs necessitated by the malicious conduct of the defendant. *Nichols v. United States*, App. D.C., 343 A.2d 336 (1975).

Minimum value must be established. — In order to be found in violation of this section, some evidence of a minimum value must be established by the government. In re W.B.W., App. D.C., 397 A.2d 143 (1979).

Specific evidence of property value must be presented. — Unlike proof of arson, the government must introduce specific evidence of property value in order to show malicious destruction of property. *Logan v. United States*, App. D.C., 460 A.2d 34 (1983).

Value may be proven by inference. — The value of property may be inferred from evidence respecting its useful, functional purpose. *Paige v. United States*, App. D.C., 183 A.2d 759 (1962); In re W.B.W., App. D.C., 397 A.2d 143 (1979).

Or by judicial notice. — The court may take judicial notice of the fact that a liquor

store, which was the "store" referred to in an indictment charging malicious destruction of property of a value of \$200 or more, had a value exceeding \$200. *Nichols v. United States*, App. D.C., 343 A.2d 336 (1975).

Indictment or information must allege value of property injured. *Nation v. District of Columbia*, 34 App. D.C. 453 (1910).

Precise value of injury need not be shown. — To prove an offense under this section, the government need only show that the injured property has some minimum value and is not required to show the precise value of the injury. *United States v. Berberich*, 120 WLR 537 (Super. Ct. 1992).

Where imprecise statement of value in indictment not prejudicial. — Relative imprecision in phrasing the value of the damaged property in an indictment was not prejudicial error where the defendants could not have been misled in any meaningful way and where there was evidence to show that the cost of repair to the damaged store was well over \$200. *Nichols v. United States*, App. D.C., 343 A.2d 336 (1975).

Malice. — The malice required by this section as an element of the charge of malicious destruction of property is the same as the malice required to make out a case of murder. *Brown v. United States*, App. D.C., 584 A.2d 537 (1990).

Malice under this section is defined as that which imports the absence of all elements of justification, excuse or recognized mitigation. *Brown v. United States*, App. D.C., 584 A.2d 537 (1990).

Subjective awareness of risk. — In proving malice, foreseeability of the harm to a reasonable person is relevant, but the prosecutor must further show, in order to prevail, that the defendant was subjectively aware of the risk in question. *Thomas v. United States*, App. D.C., 557 A.2d 1296 (1989).

Malicious burning of property is not lesser-included offense of arson. In re W.B.W., App. D.C., 397 A.2d 143 (1979).

Malicious destruction of property not lesser-included offense of arson. — There is no "inherent" relationship between malicious destruction of property and arson to warrant merger of malicious destruction of property as a lesser-included offense of arson, i.e., they do not protect the same interests nor are they so related that proof of malicious destruction of property is necessarily presented as part of the showing of the commission of arson. *Logan v. United States*, App. D.C., 460 A.2d 34 (1983).

Thus notice of arson charge not notice of malicious burning charge. — The only way an individual is on proper notice of facing the offense of malicious burning is to be charged with it, and a petition charging one with arson gives no notice that he may face a

charge of malicious burning. In re W.B.W., App. D.C., 397 A.2d 143 (1979).

Proof of malicious destruction of property is not necessarily presented as part of showing of arson. Logan v. United States, App. D.C., 460 A.2d 34 (1983).

Provocation as a defense. — Provocation is a proper defense to the charge of malicious destruction of property. Brown v. United States, App. D.C., 584 A.2d 537 (1990).

Provocation exists if a reasonable juror, acting reasonably, finds (1) that the conduct at issue is such as would cause an ordinary, reasonable person to lose his or her self-control and act without reflection; and (2) if so, the person exposed to the conduct was in fact provoked by it. Brown v. United States, App. D.C., 584 A.2d 537 (1990).

Defacing property not lesser-included offense of malicious destruction. — The penalty for defacing property is a fine of not less than \$250 nor more than \$5,000, or incarceration for not more than 1 year, or both. The prison term for malicious destruction of property (misdemeanor) is the same — not more than 1 year — but the fine is different: A maximum of \$1,000, and no minimum. Because the maximum fine for defacing property is greater than the maximum fine for malicious destruction of property, the former is not a "lesser" offense than the latter. Craig v. United States, App. D.C., 523 A.2d 567 (1987).

No aggregation of misdemeanors to reach threshold required for jury trial. — The Superior Court would not aggregate the penalties for multiple misdemeanor offenses charged in order to reach the threshold penalty required for a jury trial. United States v. Joseph, 122 WLR 2337 (Super. Ct. 1994).

Refusal to sever counts of second degree burglary, petit larceny and destruction of property not clearly erroneous. Wheeler v. United States, App. D.C., 470 A.2d 761 (1983).

Evidence sufficient to sustain conviction for destroying property. — See Green v. United States, App. D.C., 251 A.2d 652 (1969); Manning v. United States, App. D.C., 270 A.2d 504 (1970); Hopkins v. United States, App. D.C., 274 A.2d 418 (1971); Jenkins v. United States, App. D.C., 374 A.2d 581, cert. denied, 434 U.S. 894, 98 S. Ct. 274, 54 L. Ed. 2d 182 (1977); Childress v. United States, App. D.C., 381 A.2d 614 (1977); Simms v. United States, App. D.C., 634 A.2d 442 (1993); Wright v. United States, App. D.C., 637 A.2d 95 (1994).

Evidence sufficient to present jury issue as to attempted destruction of property. — See Williams v. United States, App. D.C., 283 A.2d 212 (1971).

Evidence sufficient to prove ownership by another. — See Killens v. United States, App. D.C., 263 A.2d 44 (1970); Gurley v. United States, App. D.C., 308 A.2d 785 (1973).

Evidence sufficient to arrest on probable cause for destroying property. — See Smith v. United States, App. D.C., 247 A.2d 293 (1968).

Evidence insufficient to sustain conviction for destroying property. — See Townsley v. United States, App. D.C., 236 A.2d 63 (1967); Crawley v. United States, App. D.C., 320 A.2d 309 (1974).

Evidence insufficient to sustain conviction for attempted second degree burglary. Shelton v. United States, App. D.C., 505 A.2d 767 (1986).

Cited in Braddy v. United States, 225 F.2d 551 (D.C. Cir. 1955); Tillotson v. United States, 231 F.2d 736 (D.C. Cir.), cert. denied, 351 U.S. 989, 76 S. Ct. 1055, 100 L. Ed. 1502 (1956); Gaynor v. United States, 247 F.2d 583 (D.C. Cir. 1957); Cureton v. United States, 396 F.2d 671 (D.C. Cir. 1968); Weeks v. United States, App. D.C., 252 A.2d 907 (1969); Johnson v. United States, App. D.C., 265 A.2d 780 (1970); King v. United States, App. D.C., 271 A.2d 556 (1970); United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972); Hubb v. United States, App. D.C., 298 A.2d 512 (1972); Tansimore v. United States, App. D.C., 355 A.2d 799 (1976); Terrell v. United States, App. D.C., 361 A.2d 207, cert. denied, 429 U.S. 984, 97 S. Ct. 501, 50 L. Ed. 2d 594 (1976); Taylor v. United States, App. D.C., 366 A.2d 444 (1976); Wynn v. United States, App. D.C., 386 A.2d 695 (1978); Farrell v. United States, App. D.C., 391 A.2d 755 (1978); Ingram v. United States, App. D.C., 392 A.2d 505 (1978); Gaetano v. United States, App. D.C., 406 A.2d 1291 (1979); Powell v. United States, App. D.C., 414 A.2d 530 (1980); Dyson v. United States, App. D.C., 418 A.2d 127 (1980); United States v. Stancil, App. D.C., 422 A.2d 1285 (1980); Carpenter v. United States, App. D.C., 430 A.2d 496, cert. denied, 454 U.S. 852, 102 S. Ct. 295, 70 L. Ed. 2d 143 (1981); United States v. Mendelsohn, App. D.C., 443 A.2d 1311 (1982); Arnold v. United States, App. D.C., 443 A.2d 1318 (1982); United States v. Davidson, 110 WLR 217 (Super. Ct. 1982); Davidson v. United States, App. D.C., 467 A.2d 1282 (1983); Thorne v. United States, App. D.C., 471 A.2d 247 (1983); Ray v. United States, App. D.C., 472 A.2d 854 (1984); Anderson v. United States, App. D.C., 481 A.2d 1299 (1984); Byrd v. United States, App. D.C., 485 A.2d 947 (1984); Eldridge v. United States, App. D.C., 492 A.2d 879 (1985); Brooks v. United States, App. D.C., 494 A.2d 922 (1984); Tyler v. United States, App. D.C., 495 A.2d 1180 (1985); Freeman v. United States, App. D.C., 495 A.2d 1183 (1985); Wright v. United States, App. D.C., 508 A.2d 915 (1986); Boswell v. United States, App. D.C., 511 A.2d 29 (1986); Ross v. United States, App. D.C., 520 A.2d 1064 (1987); Wise v. United States, App. D.C., 522 A.2d 898 (1987); Henderson v. United States, App. D.C., 527

A.2d 1262 (1987); *Hill v. United States*, App. D.C., 529 A.2d 788 (1987); *Carter v. United States*, App. D.C., 531 A.2d 956 (1987); *United States v. Wheeler*, 115 WLR 2025 (Super. Ct. 1987); *Shepard v. United States*, App. D.C., 538 A.2d 1115 (1988); *United States v. Peoples*, 116 WLR 1161 (Super. Ct. 1988); *Jones v. United States*, App. D.C., 560 A.2d 513 (1989); *Wright v. United States*, App. D.C., 570 A.2d 731 (1990); *Greene v. United States*, App. D.C., 571 A.2d 218 (1990); *Holland v. United States*, App. D.C., 584 A.2d 13 (1990); *Reed v. United States*,

App. D.C., 584 A.2d 585 (1990); *Brooks v. United States*, App. D.C., 599 A.2d 1094 (1991); *Leonard v. United States*, App. D.C., 602 A.2d 1112 (1992); *McFadden v. United States*, App. D.C., 614 A.2d 11 (1992); *United States v. Montgomery*, 815 F. Supp. 7 (D.D.C. 1993); *United States v. Harris*, App. D.C., 629 A.2d 481 (1993); *Carey v. United States*, App. D.C., 647 A.2d 56 (1994); *Butler v. United States*, App. D.C., 649 A.2d 563 (1994); *Harris v. United States*, App. D.C., 668 A.2d 839 (1995).

§ 22-404. Malicious burning of fences, woods, crops.

Whoever shall maliciously burn or set fire to any fences, woods, stacks of hay, grain, or straw, or growing crops, the property, in whole or in part, of another, shall be imprisoned for not more than 30 days or be fined not more than \$500, or both. (Mar. 3, 1901, 31 Stat. 1323, ch. 854, § 822; 1973 Ed., § 22-404.)

CHAPTER 5. ASSAULT; MAYHEM; THREATS.

Sec.

- 22-501. Assault with intent to kill, rob, or poison, or to commit first degree sexual abuse, second degree sexual abuse or child sexual abuse.
- 22-502. Assault with intent to commit mayhem or with dangerous weapon.
- 22-503. Assault with intent to commit any other offense.
- 22-504. Assault or threatened assault in a menacing manner; stalking.

Sec.

- 22-504.1. Aggravated assault.
- 22-505. Assault on member of police force, campus or university special police, or fire department.
- 22-506. Mayhem or maliciously disfiguring.
- 22-507. Threats to do bodily harm.
- 22-508. Penalty for assaulting, beating, or fighting on account of money won by gaming.

§ 22-501. Assault with intent to kill, rob, or poison, or to commit first degree sexual abuse, second degree sexual abuse or child sexual abuse.

Every person convicted of any assault with intent to kill or to commit first degree sexual abuse, second degree sexual abuse, or child sexual abuse, or to commit robbery, or mingling poison with food, drink, or medicine with intent to kill, or wilfully poisoning any well, spring, or cistern of water, shall be sentenced to imprisonment for not less than 2 years or more than 15 years. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 803; Dec. 27, 1967, 81 Stat. 736, Pub. L. 90-226, title VI, § 601; 1973 Ed., § 22-501; May 23, 1995, D.C. Law 10-257, § 401(b)(2), 42 DCR 53.)

- I. General Consideration.
- II. Assault.
 - A. In General.
 - B. With Intent to Kill.
 - C. With Intent to Commit Rape.
 - D. With Intent to Commit Robbery.

I. GENERAL CONSIDERATION.

Cross references. — As to assault because of gaming losses, see § 22-508.

As to additional penalty for possession of firearm, see § 22-3202.

As to minimum sentence when previously convicted of crime of violence, see § 24-203.

Section references. — This section is referred to in § 22-4107.

Effect of amendments. — D.C. Law 10-257 substituted “first degree sexual abuse, second degree sexual abuse or child sexual abuse” for “rape.”

Legislative history of Law 10-257. — Law 10-257, the “Anti-Sexual Abuse Act of 1994,” was introduced in Council and assigned Bill No. 10-87, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on November 1, 1994, and December 6, 1994, respectively. Signed by the Mayor on December 28, 1994, it was assigned Act No. 10-385 and transmitted to both Houses

of Congress for its review. D.C. Law 10-257 became effective May 23, 1995.

This jurisdiction recognizes 2 types of assault, distinguished by the nature of intent that must be proven: “Attempted battery assault” requires proof of an attempt to cause a physical injury, coupled with the present ability of using actual violence against the person; “intent-to-frighten assault” requires proof of threatening conduct intended either to injure or frighten the victim. *Smith v. United States*, App. D.C., 601 A.2d 1080 (1992).

Reasonableness of belief in need to resort to self defense. — Government could elicit for purposes of the jury’s consideration limited testimony bearing on the reasonableness of defendant’s apprehension of the need to resort to self defense under the circumstances surrounding the incident. *Mathews v. United States*, App. D.C., 539 A.2d 1092 (1988).

Joinder of counts does not work undue prejudice where allegations are separate and distinct. — Where defendant was charged

under this section (assault), §§ 22-2401 (murder), 22-2801 (rape), 22-2901 (robbery), 22-3202 (crime with a weapon), and former 22-3502 (sodomy), the allegations were, though similar in nature, separate and distinct. There was little likelihood of the charges being confused or treated as one event, and joinder of the counts against defendant therefore did not work undue prejudice. *Bowyer v. United States*, App. D.C., 422 A.2d 973 (1980).

Intent. — Intent being a state of mind, unless admitted by the defendant, it must be shown by circumstantial evidence because there is no way of fathoming and scrutinizing the human mind. *Jones v. United States*, App. D.C., 516 A.2d 929 (1986), cert. denied, 481 U.S. 1054, 107 S. Ct. 2193, 95 L. Ed. 2d 848 (1987).

Evidence held sufficient to support separate convictions under this section, former § 22-3502, and §§ 22-503 and 22-2101. — See *Robinson v. United States*, App. D.C., 501 A.2d 1273 (1985).

Cited in *Coratola v. United States*, 24 App. D.C. 229 (1904); *Miller v. United States*, 19 F.2d 702 (D.C. Cir. 1927); *Brown v. United States*, 152 F.2d 138 (D.C. Cir. 1945); *Holloway v. United States*, 191 F.2d 504 (D.C. Cir. 1951); *Creed v. United States*, App. D.C., 156 A.2d 676 (1959); *Rucker v. United States*, 280 F.2d 623 (D.C. Cir. 1960); *Nixon v. United States*, 309 F.2d 316 (D.C. Cir. 1962), cert. denied, 385 U.S. 963, 87 S. Ct. 405, 17 L. Ed. 2d 307 (1966); *Brown v. United States*, 338 F.2d 543 (D.C. Cir. 1964); *Ingram v. United States*, 353 F.2d 872 (D.C. Cir. 1965); *Dozier v. United States*, 382 F.2d 482 (D.C. Cir. 1967); *Payne v. United States*, 392 F.2d 820 (D.C. Cir. 1968); *Jackson v. United States*, 395 F.2d 615 (D.C. Cir. 1968); *Green v. United States*, 397 F.2d 643 (D.C. Cir. 1968); *United States v. Straite*, 425 F.2d 594 (D.C. Cir. 1970); *Bowles v. United States*, 439 F.2d 536 (D.C. Cir. 1970), cert. denied, 401 U.S. 995, 91 S. Ct. 1240, 28 L. Ed. 2d 533 (1971); *United States v. Dunn*, 459 F.2d 1115 (D.C. Cir. 1972); *United States v. McCrae*, 459 F.2d 1140 (D.C. Cir. 1972); *United States v. Raymond*, 337 F. Supp. 641 (D.D.C. 1972), aff'd sub nom. *United States v. Addison*, 498 F.2d 741 (D.C. Cir. 1974); *United States v. Smith*, 470 F.2d 377 (D.C. Cir. 1972); *United States v. Zeiger*, 475 F.2d 1280 (D.C. Cir. 1972); *United States v. Anderson*, 352 F. Supp. 33 (D.D.C. 1972), aff'd, 490 F.2d 785 (D.C. Cir. 1974); *United States v. Jones*, 475 F.2d 322 (D.C. Cir. 1972); *United States v. Hawkins*, 480 F.2d 1151 (D.C. Cir. 1973); *United States v. Addison*, 498 F.2d 741 (D.C. Cir. 1974); *United States v. Anderson*, 352 F. Supp. 33 (D.D.C. 1972), aff'd, 490 F.2d 785 (D.C. Cir. 1974); *Smith v. United States*, App. D.C., 315 A.2d 163, cert. denied, 419 U.S. 896, 95 S. Ct. 174, 42 L. Ed. 2d 139 (1974); *United States v. Marshall*, 511 F.2d 1308 (D.C. Cir. 1975); *Coleman v. United States*, App. D.C., 332

A.2d 355 (1975); *Washington v. United States*, App. D.C., 334 A.2d 185 (1975); *Fletcher v. United States*, App. D.C., 335 A.2d 248 (1975); *United States v. Engram*, App. D.C., 337 A.2d 488 (1975), cert. denied, 423 U.S. 1058, 96 S. Ct. 793, 46 L. Ed. 2d 648 (1976); *Hutchinson v. United States*, App. D.C., 339 A.2d 381 (1975); *United States v. Sedgwick*, App. D.C., 345 A.2d 465, application denied, 423 U.S. 1028, 96 S. Ct. 558, 46 L. Ed. 2d 402 (1975), cert. denied, 425 U.S. 966, 96 S. Ct. 1751, 48 L. Ed. 2d 210 (1976); *Harman v. United States*, App. D.C., 351 A.2d 504, cert. denied, 429 U.S. 841, 97 S. Ct. 116, 50 L. Ed. 2d 110 (1976); *Morgan v. United States*, App. D.C., 363 A.2d 999 (1976), cert. denied, 431 U.S. 919, 97 S. Ct. 2187, 53 L. Ed. 2d 231 (1977); *Johnson v. United States*, App. D.C., 366 A.2d 429 (1976); *Harley v. United States*, App. D.C., 373 A.2d 898 (1977); *Cates v. United States*, App. D.C., 379 A.2d 968 (1977); *Proctor v. United States*, App. D.C., 381 A.2d 249 (1977); *Rosser v. United States*, App. D.C., 381 A.2d 598 (1977); *Nowlin v. United States*, App. D.C., 382 A.2d 9 (1978); *Reed v. United States*, App. D.C., 383 A.2d 316, cert. denied, 439 U.S. 871, 99 S. Ct. 203, 58 L. Ed. 2d 183 (1978); *Cole v. United States*, App. D.C., 384 A.2d 651 (1978); *Cureton v. United States*, App. D.C., 386 A.2d 278 (1978); *Ward v. United States*, App. D.C., 386 A.2d 1180 (1978); *Brown v. United States*, App. D.C., 388 A.2d 451 (1978); *Pettaway v. United States*, App. D.C., 390 A.2d 981 (1978); *McBride v. United States*, App. D.C., 393 A.2d 123 (1978), cert. denied, 440 U.S. 927, 99 S. Ct. 1260, 59 L. Ed. 2d 482 (1979); *Gilbert v. United States*, App. D.C., 395 A.2d 1 (1978); *Peoples v. United States*, App. D.C., 395 A.2d 41 (1978), cert. denied, 442 U.S. 911, 99 S. Ct. 282, 61 L. Ed. 2d 277 (1979); *Harvey v. United States*, App. D.C., 395 A.2d 92 (1978), cert. denied, 441 U.S. 936, 99 S. Ct. 2061, 60 L. Ed. 2d 665 (1979); *Ellis v. United States*, App. D.C., 395 A.2d 404 (1978), cert. denied, 442 U.S. 913, 99 S. Ct. 2830, 61 L. Ed. 2d 280 (1979); *Oesby v. United States*, App. D.C., 398 A.2d 1 (1979); *Johnson v. United States*, App. D.C., 398 A.2d 354 (1979); *Jones v. United States*, App. D.C., 401 A.2d 473 (1979); *Sellers v. United States*, App. D.C., 401 A.2d 974 (1979); *Sampson v. United States*, App. D.C., 406 A.2d 574 (1979); *In re W.A.F.*, App. D.C., 407 A.2d 1062 (1979); *Khaalis v. United States*, App. D.C., 408 A.2d 313 (1979), cert. denied, 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781 (1980); *Calaway v. United States*, App. D.C., 408 A.2d 1220 (1979); *Bittle v. United States*, App. D.C., 410 A.2d 1383 (1980); *Bridgeford v. United States*, App. D.C., 411 A.2d 633 (1980); *In re T.L.J.*, App. D.C., 413 A.2d 154 (1980); *Thomas v. United States*, App. D.C., 418 A.2d 122 (1980); *Mangrum v. United States*, App. D.C., 418 A.2d 1071, cert. denied, 449 U.S. 997, 101 S. Ct. 539, 66 L. Ed. 2d 296 (1980);

- United States v. Brown, App. D.C., 422 A.2d 1281 (1980); Washington v. United States, App. D.C., 434 A.2d 394 (1980); Allen v. United States, App. D.C., 431 A.2d 27 (1981); Little v. United States, App. D.C., 438 A.2d 1264 (1981); Perkins v. United States, App. D.C., 446 A.2d 19 (1982); Green v. United States, App. D.C., 446 A.2d 402 (1982); Bailey v. United States, App. D.C., 447 A.2d 779 (1982); Brooks v. United States, App. D.C., 448 A.2d 253 (1982); Parks v. United States, App. D.C., 451 A.2d 591 (1982), cert. denied, 461 U.S. 945, 103 S. Ct. 2123, 77 L. Ed. 2d 1303 (1983); White v. United States, App. D.C., 451 A.2d 848 (1982); Taylor v. United States, App. D.C., 451 A.2d 859 (1982), cert. denied, 461 U.S. 936, 103 S. Ct. 2105, 77 L. Ed. 2d 311 (1983); Reed v. United States, App. D.C., 452 A.2d 1173 (1982); Benjamin v. United States, App. D.C., 453 A.2d 810 (1982); Alston v. United States, App. D.C., 462 A.2d 1122 (1983); In re C.L.W., App. D.C., 467 A.2d 706 (1983); Wells v. United States, App. D.C., 469 A.2d 1248 (1983); Smith v. United States, App. D.C., 470 A.2d 315 (1983), cert. denied, 469 U.S. 1218, 105 S. Ct. 1201, 84 L. Ed. 2d 344 (1985); Washington v. United States, App. D.C., 470 A.2d 729 (1983), cert. denied, 481 U.S. 1030, 107 S. Ct. 1957, 95 L. Ed. 2d 530 (1987); Pennington v. United States, App. D.C., 471 A.2d 250 (1983); Harley v. United States, App. D.C., 471 A.2d 1013 (1984); Sherrod v. United States, App. D.C., 478 A.2d 644 (1984); Moreno v. United States, App. D.C., 482 A.2d 1233 (1984), cert. denied, 469 U.S. 1226, 105 S. Ct. 1222, 84 L. Ed. 2d 362 (1985); Coates v. United States, App. D.C., 482 A.2d 1239 (1984), cert. denied, 472 U.S. 1030, 105 S. Ct. 3507, 87 L. Ed. 2d 637 (1985); Douglas v. United States, App. D.C., 488 A.2d 121 (1985); Allen v. United States, App. D.C., 495 A.2d 1145 (1985); Cox v. United States, App. D.C., 498 A.2d 231 (1985); Davis v. United States, App. D.C., 498 A.2d 242 (1985); Washington v. United States, App. D.C., 499 A.2d 95 (1985); Scutchings v. United States, App. D.C., 509 A.2d 634 (1986); Arnold v. United States, App. D.C., 511 A.2d 399 (1986); Williams v. United States, App. D.C., 521 A.2d 663 (1987); Settles v. United States, App. D.C., 522 A.2d 348 (1987); Bartley v. United States, App. D.C., 530 A.2d 692 (1987); Waller v. United States, App. D.C., 531 A.2d 994 (1987); Clifford v. United States, App. D.C., 532 A.2d 628 (1987); Gibson v. United States, App. D.C., 536 A.2d 78 (1987); Beard v. United States, App. D.C., 535 A.2d 1373 (1988); United States v. Peoples, 116 WLR 1161 (Super. Ct. 1988); Johnson v. United States, App. D.C., 544 A.2d 270 (1988); Thomas v. United States, App. D.C., 544 A.2d 1260 (1988); Harris v. Ferguson, 116 WLR 1981 (Super. Ct. 1988); Byrd v. United States, App. D.C., 551 A.2d 96 (1988), cert. denied, 493 U.S. 968, 110 S. Ct. 415, 107 L. Ed. 2d 380 (1989); Durant v. United States, App. D.C., 551 A.2d 1318 (1988); Warrick v. United States, App. D.C., 551 A.2d 1332 (1988); Brewer v. United States, App. D.C., 559 A.2d 317 (1989), cert. denied, 493 U.S. 1092, 110 S. Ct. 1163, 107 L. Ed. 2d 1066 (1990); Garris v. United States, App. D.C., 559 A.2d 323 (1989); Scott v. United States, App. D.C., 559 A.2d 745 (1989); Landrum v. United States, App. D.C., 559 A.2d 1323 (1989); United States v. McNeil, 911 F.2d 768 (D.C. Cir. 1990); Miles v. Rollins, 733 F. Supp. 128 (D.D.C. 1990); Ramsey v. United States, App. D.C., 569 A.2d 142 (1990); Tucker v. United States, App. D.C., 569 A.2d 162 (1990); Solomon v. United States, App. D.C., 569 A.2d 1185 (1990); Scutchings v. United States, App. D.C., 570 A.2d 1197 (1990); Brown v. United States, App. D.C., 576 A.2d 731 (1990); Rice v. United States, App. D.C., 580 A.2d 119 (1990); Holmes v. United States, App. D.C., 580 A.2d 1259 (1990); Green v. United States, App. D.C., 580 A.2d 1325 (1990); Johnson v. United States, App. D.C., 585 A.2d 766 (1991); Norris v. United States, App. D.C., 585 A.2d 1372 (1991); Kelly v. United States, App. D.C., 590 A.2d 1031 (1991); Harris v. United States, App. D.C., 594 A.2d 546 (1991); Caldwell v. United States, App. D.C., 595 A.2d 961 (1991); United States v. Hobbs, 119 WLR 673 (Super. Ct. 1991); Joseph v. United States, App. D.C., 597 A.2d 14 (1991), cert. denied, 504 U.S. 928, 112 S. Ct. 1988, 118 L. Ed. 2d 585 (1992); McGrier v. United States, App. D.C., 597 A.2d 36 (1991); Johnson v. United States, App. D.C., 597 A.2d 917 (1991); Hazel v. United States, App. D.C., 599 A.2d 38 (1991), cert. denied, 506 U.S. 939, 113 S. Ct. 374, 121 L. Ed. 2d 286 (1992); Freeman v. United States, App. D.C., 600 A.2d 1070 (1991); Arthur v. United States, App. D.C., 602 A.2d 174 (1992); Price v. United States, App. D.C., 602 A.2d 641 (1992); Leonard v. United States, App. D.C., 602 A.2d 1112 (1992); Taylor v. United States, App. D.C., 603 A.2d 451, cert. denied, 506 U.S. 852, 113 S. Ct. 155, 121 L. Ed. 2d 105 (1992); Samuels v. United States, App. D.C., 605 A.2d 596 (1992); Martin v. United States, App. D.C., 606 A.2d 120 (1991); Hayward v. United States, App. D.C., 612 A.2d 224 (1992); Martin v. United States, App. D.C., 614 A.2d 51 (1992); Halicki v. United States, App. D.C., 614 A.2d 499 (1992); Foster v. United States, App. D.C., 615 A.2d 213 (1992); Ford v. United States, App. D.C., 616 A.2d 1245 (1992); Harris v. United States, App. D.C., 618 A.2d 140 (1992); United States v. Turner, 121 WLR 105 (Super. Ct. 1992); United States v. Dixon, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993); King v. United States, App. D.C., 618 A.2d 727 (1993); Coleman v. United States, App. D.C., 619 A.2d 40 (1993); Jones v. United States, App. D.C., 625 A.2d 281 (1993); Mitchell v. United States, App. D.C., 629 A.2d 10 (1993), cert. denied, — U.S. —, 114 S. Ct. 1119, 127 L. Ed. 2d 429 (1994); Davis v.

United States, App. D.C., 629 A.2d 570 (1993); Poole v. United States, App. D.C., 630 A.2d 1109 (1993), cert. denied, — U.S. —, 115 S. Ct. 160, 130 L. Ed. 2d 98 (1994); Matos v. United States, App. D.C., 631 A.2d 28 (1993); Wilkes v. United States, App. D.C., 631 A.2d 880 (1993), cert. denied, — U.S. —, 115 S. Ct. 143, 130 L. Ed. 2d 84 (1994); Stratmon v. United States, App. D.C., 631 A.2d 1177 (1993); Clark v. United States, App. D.C., 639 A.2d 76 (1993); McKinnon v. United States, App. D.C., 644 A.2d 438, cert. denied, — U.S. —, 115 S. Ct. 523, 130 L. Ed. 2d 428 (1994); Martin v. United States, App. D.C., 647 A.2d 1135 (1994); Riley v. United States, App. D.C., 647 A.2d 1165 (1994); Trice v. United States, App. D.C., 662 A.2d 891 (1995); Bragdon v. United States, App. D.C., 668 A.2d 403 (1995).

II. ASSAULT.

A. In General.

"Assault" defined. — Assault is an attempt or effort with force or violence to do injury to the person of another, coupled with the apparent present ability to carry out such attempt or effort. *Anthony v. United States*, App. D.C., 361 A.2d 202 (1976).

Actual ability to harm not required for assault. — The crime of assault does not require that a perpetrator possess an actual ability to inflict the threatened harm; the assailant's undisclosed inability to do harm does not preclude an assault conviction. *Anthony v. United States*, App. D.C., 361 A.2d 202 (1976).

As threat measured by person of reasonable sensibilities. — Although the question as to whether a defendant's conduct produced fear in a victim is relevant, the crucial inquiry as to whether a defendant committed an assault is whether he acted in such a manner as would, under the circumstances, portend an immediate threat of danger to a person of reasonable sensibility. *Anthony v. United States*, App. D.C., 361 A.2d 202 (1976).

Separate concurrent sentences for assault with intent to commit rape and assault with intent to commit sodomy, when the conduct took place within a short period of time, and in a confined area, did not violate the Double Jeopardy Clause, since the single transaction gave rise to distinct offenses under separate statutes. *Robinson v. United States*, App. D.C., 501 A.2d 1273 (1985).

B. With Intent to Kill.

Assault with intent to kill while armed is crime requiring specific intent. *United States v. Martin*, 475 F.2d 943 (D.C. Cir. 1973).

And prosecution to prove capacity to form requisite intent. — Once the defense of intoxication is interposed in a prosecution on a

charge of assault with intent to kill while armed, the burden rests with the prosecution to establish that at the time the offense was committed the defendant had the capacity to form the requisite specific intent. *United States v. Martin*, 475 F.2d 943 (D.C. Cir. 1973).

Specific intent distinguished from general intent. — A specific intent to kill exists when a person acts with the purpose or conscious intention of causing the death of another, and should be distinguished from the concept of general intent to kill, which involves an intention to commit an act of sufficient force to endanger the life of another, but not necessarily with any intent to bring about death as a result. *Logan v. United States*, App. D.C., 483 A.2d 664 (1984).

Malice not required. — Because malice does not always accompany a specific intent to kill, a person may be convicted of assault with intent to kill under this section, even though the state of mind at the time of the crime was not sufficient to constitute murder. *Logan v. United States*, App. D.C., 483 A.2d 664 (1984).

Merger of counts. — Where defendant is charged with three counts of assault with intent to kill while armed, the counts need not be merged if a reasonable jury could conclude that one shot was fired at each victim. *Gray v. United States*, App. D.C., 585 A.2d 164 (1991).

Double jeopardy. — Trial court did not violate the proscription against double jeopardy when it imposed two separate and concurrent sentences for assault with intent to kill while armed and malicious disfigurement while armed. *Wilson v. United States*, App. D.C., 528 A.2d 876 (1987).

Since victim had not died at the time defendant was prosecuted for assault with intent to kill while armed, all the events necessary for prosecution of second degree murder had not occurred when the prosecution for assault with intent to kill commenced. Double jeopardy, therefore, would not bar a subsequent prosecution for second degree murder; since malice was not presented to the jury at the first trial, the government was collaterally estopped from proving that the defendant acted with malice. *United States v. Jackson*, App. D.C., 528 A.2d 1211 (1987).

Specific intent established. — Evidence was sufficient to establish beyond a reasonable doubt that the defendant had the specific intent to kill children when he fired into the room where they were at such range which was bound to place in peril the lives of his young potential victims. *Gray v. United States*, App. D.C., 585 A.2d 164 (1991).

Offense of assault with intent to kill while armed merges with assault with dangerous weapon where the two offenses arise out of the same act, as the latter is a lesser-included offense of the former. *Leftwich*

v. United States, App. D.C., 460 A.2d 993 (1983).

Kidnapping did not merge with underlying assault. — Kidnapping was not merely an incident of an assault with intent to kill, and did not merge with the underlying assault, where the defendant initially tried to kill the victim, but having failed in this attempt, seized the victim's keys, opened the trunk of the victim's car, and demanded that the victim climb in, so that assault ended before the kidnapping even began. *Nelson v. United States*, App. D.C., 601 A.2d 582 (1991).

Merger of convictions for possession of firearms. — A conviction under § 22-3204(b) for possession of a firearm during a crime of violence does not merge into a conviction under this section and § 22-3202, for assault with intent to kill while armed. *Little v. United States*, App. D.C., 613 A.2d 880 (1992).

Evidence was clearly sufficient to support an instruction for assault with intent to kill. *Jackson v. United States*, App. D.C., 650 A.2d 659 (1994).

Evidence sufficient to sustain conviction of assault with intent to kill. — See *Allen v. United States*, 420 F.2d 223 (D.C. Cir. 1969); *United States v. Bridges*, 432 F.2d 692 (D.C. Cir. 1970); *United States v. Craven*, 458 F.2d 802 (D.C. Cir. 1972); *United States v. Hill*, 470 F.2d 361 (D.C. Cir. 1972); *United States v. Robertson*, 507 F.2d 1148 (D.C. Cir. 1974), overruled on other grounds, *United States v. Marble*, 940 F.2d 1543 (1991); *Wooten v. United States*, App. D.C., 343 A.2d 281 (1975); *In re G.O.B.*, App. D.C., 343 A.2d 567 (1975); *Brown v. United States*, App. D.C., 349 A.2d 467 (1975); *Graham v. United States*, App. D.C., 377 A.2d 1138 (1977), cert. denied, 434 U.S. 1022, 98 S. Ct. 748, 54 L. Ed. 2d 770 (1978); *Taylor v. United States*, App. D.C., 380 A.2d 989 (1977); *Allen v. United States*, App. D.C., 383 A.2d 363 (1978); *Christian v. United States*, App. D.C., 394 A.2d 1 (1978), cert. denied, 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315 (1979); *Bedney v. United States*, App. D.C., 471 A.2d 1022 (1984).

Consecutive sentences for armed robbery and assault with intent to kill. — Where, during the course of a robbery, defendant shot one of his robbery victims, and was convicted of both the armed robbery of his victim under §§ 22-2901 and 22-3202 and assault with intent to kill while armed under this section and § 22-3202, separate, consecutive sentences for the two convictions were not precluded by the merger doctrine. *Taylor v. United States*, App. D.C., 508 A.2d 99 (1986).

C. With Intent to Commit Rape.

Elements of assault with intent to commit rape. — To make out a case of assault with intent to commit rape, the evidence must show,

beyond a reasonable doubt, an assault, an intent to have carnal knowledge of the female, and a purpose to carry into effect the intent with force and against the consent of the female. *Hammond v. United States*, 127 F.2d 752 (D.C. Cir. 1942); *Robinson v. United States*, 136 F.2d 283 (D.C. Cir. 1943); *Baber v. United States*, 324 F.2d 390 (D.C. Cir. 1963), cert. denied, 376 U.S. 972, 84 S. Ct. 1139, 12 L. Ed. 2d 86 (1964).

The essential elements of an assault with intent to commit rape, each of which the government must prove beyond reasonable doubt, are: (1) That defendant made an assault upon complainant; (2) that he did so with specific intent to have intercourse with the complainant; and (3) that he intended to achieve penetration of complainant's sexual organ against her will and by using such force or threat of force as might be necessary to overcome resistance or make further resistance useless. *United States v. Bryant*, 420 F.2d 1327 (D.C. Cir. 1969), overruled on other grounds, *United States v. Gray*, 477 F.2d 444 (D.C. Cir. 1973).

Counts of an indictment charging the defendant with assaulting female persons with intent to carnally know and abuse such persons did not charge offenses under District of Columbia law where the victims were females over 16 years of age. *United States v. Hutchinson*, 478 F.2d 997 (D.C. Cir. 1973).

Element of force essential. — Absent an element of intended force, an assault with intent to have sexual intercourse is not an assault with intent to commit rape. *United States v. Bryant*, 420 F.2d 1327 (D.C. Cir. 1969), overruled on other grounds, *United States v. Gray*, 477 F.2d 444 (D.C. Cir. 1973).

Assault with intent to rape is established by the use of, and with the intent to use, some physical force for the purpose of achieving sexual gratification, but it requires an intent to persist in such force even in the face of, and for the purpose of overcoming, the victim's resistance. *United States v. Huff*, 442 F.2d 885 (D.C. Cir. 1971).

Evidence in a prosecution for assault with intent to commit rape was insufficient to establish that the defendant intended to achieve sexual intercourse by force and violence and against the will of the prosecutrix, and the charge was therefore dismissed. *United States v. Tremble*, 470 F.2d 1272 (D.C. Cir. 1972).

But proof of intent to use force not necessary with child under 16. — The material elements of an assault with intent to commit rape are an assault, an intent to have carnal knowledge of a female, and a purpose to carry into effect this intent with force and against consent of the female, unless the intended victim is a child under the age of 16, in which case intent to use force need not be alleged or proved. *Allison v. United States*, 409 F.2d 445

(D.C. Cir. 1969), overruled on other grounds, *United States v. Gray*, 477 F.2d 444 (D.C. Cir. 1973).

An assault on a female under the age of 16 years, with the intent to carnally know her, is punishable under this section as an assault with intent to rape. *Sanselo v. United States*, 44 App. D.C. 508 (1916).

Or when victim treated as if under 16. — Section 22-2801, dispensing with the element of force in cases involving rape of a child under 16 years of age, should be read to apply in a prosecution for assault with intent to rape where the victim, although 27 years of age, has the mind of a child of about 7 years. *United States v. Medley*, 452 F.2d 1325 (D.C. Cir. 1971).

Consent. — Although the trial judge did not instruct the jury that it could find that the complainant consented if it found that the defendant had reasonable grounds to believe that there was consent, the trial judge nevertheless protected defendant's right to a consent instruction by making it clear to the jury that the government had to prove beyond a reasonable doubt that the complainant did not consent to defendant's acts. *Davis v. United States*, App. D.C., 613 A.2d 906 (1992).

Submission or resistance not factor in assault upon child. — An assault may be committed upon a child irrespective of whether there is submission or resistance thereto. *Beausoliel v. United States*, 107 F.2d 292 (D.C. Cir. 1939).

Offense goes beyond taking of indecent liberties. — An assault with intent to commit carnal knowledge on a child is certainly the taking of indecent liberties with a child, but it is the taking of indecent liberties plus an intent much more vicious, violent or aggravated. *Younger v. United States*, 263 F.2d 735 (D.C. Cir.), cert. denied, 360 U.S. 905, 79 S. Ct. 1289, 3 L. Ed. 2d 1257 (1959).

Assault with intent to commit carnal knowledge and taking indecent liberties with a minor child do not merge into one offense because a new criminal impulse separated the two; court did not err in allowing the jury to treat them as two separate offenses and in finding defendant guilty of both. *Spain v. United States*, 665 A.2d 658 (D.C. App. 1995).

And proof of intent to rape necessary. — In a prosecution for assault with intent to rape, defendant was entitled to directed verdict because of lack of evidence of purpose to carry into effect the intent to commit rape with force and against consent of victim. *Baber v. United States*, 324 F.2d 390 (D.C. Cir. 1963), cert. denied, 376 U.S. 972, 84 S. Ct. 1139, 12 L. Ed. 2d 86 (1964).

A defendant who handles a lady vigorously and with some force (against her will) is guilty of an indecent assault; but he does not have an intent to commit rape if his actions are taken in

the hope or expectation of thereby awakening desire, with the further intention of desisting if his approach does not arouse desire or lead to acquiescence. *United States v. Bryant*, 420 F.2d 1327 (D.C. Cir. 1969), overruled on other grounds, *United States v. Gray*, 477 F.2d 444 (D.C. Cir. 1973).

But intent inferable from defendant's conduct. — Where a defendant is charged with assault with intent to commit rape, intent may be inferred from his conduct. *Higgins v. United States*, 401 F.2d 396 (D.C. Cir. 1968).

In a prosecution for assault with intent to commit carnal knowledge, the evidence sufficiently corroborated complainant's testimony that such offense had been committed. *United States v. Terry*, 422 F.2d 704 (D.C. Cir. 1970).

Sex charges may not be submitted to the jury simply upon the testimony of the alleged victim; corroboration is essential to proof of each element. *United States v. Tremble*, 470 F.2d 1272 (D.C. Cir. 1972).

A prosecution under this section must be submitted to the jury with specific instructions requiring a finding of independent evidence corroborative of the victim's testimony as a condition precedent to a guilty verdict. *Fitzgerald v. United States*, App. D.C., 412 A.2d 1 (1980).

Only where minor involved as victim. — *Arnold v. United States*, App. D.C., 358 A.2d 335 (1976), eliminates the need for corroboration where a mature female victim is involved. *Fitzgerald v. United States*, App. D.C., 412 A.2d 1 (1980), but see, *Gary v. United States*, App. D.C., 499 A.2d 815 (1985), cert. denied sub nom. *Cole v. United States*, 475 U.S. 1086, 106 S. Ct. 1470, 89 L. Ed. 2d 725, cert. denied, 477 U.S. 906, 106 S. Ct. 3279, 90 L. Ed. 2d 568 (1986).

Jury's function to determine if standard of corroborative proof met. — While corroboration is initially a matter for the trial court, as in any question concerning the legal sufficiency of the evidence, it is the jury's function to decide whether the standard of corroborative proof has been met. *Fitzgerald v. United States*, App. D.C., 412 A.2d 1 (1980).

Physical facts may tend to establish essential corroboration of corpus delicti in a prosecution for an assault with intent to rape, but in such a case there must be evidence, subject to such corroboration, that the accused sought to achieve carnal knowledge with force and against consent of the victim. *United States v. Medley*, 452 F.2d 1325 (D.C. Cir. 1971).

Or corroboration by circumstantial evidence. — In a prosecution for assault with intent to rape, corroboration of an accused's intent to achieve carnal knowledge with force and against the consent of the victim may be established by circumstantial evidence when the victim is incompetent to testify. *United States v. Medley*, 452 F.2d 1325 (D.C. Cir. 1971).

Where there was extrinsic evidence of com-

plainant's emotional state immediately after the alleged incident which tended to support her story, there was sufficient corroboration in light of the additional factors diminishing the risk of false accusation (e.g., no motive to fabricate, demeanor at trial). *Fitzgerald v. United States*, App. D.C., 412 A.2d 1 (1980).

Failure to give corroboration instruction deemed reversible error. — Where, in a sex case involving a minor, the court omitted the corroboration instruction, this was error and required reversal of defendant's conviction. *Fitzgerald v. United States*, App. D.C., 412 A.2d 1 (1980).

But may be harmless error. — Where the circumstances provided adequate independent evidence that accusations of sodomy and assault with intent to commit rape were not a fabrication, the court's failure to give the required corroboration instruction was harmless error. *Williams v. United States*, App. D.C., 385 A.2d 760 (1978).

Sexual assault charges by mentally challenged girl should be subjected to great scrutiny. *United States v. Benn*, 476 F.2d 1127 (D.C. Cir. 1973).

Simple assault is lesser offense under count charging assault on female with intent to commit carnal knowledge. *Dozier v. United States*, 382 F.2d 482 (D.C. Cir. 1967); *United States v. Bryant*, 420 F.2d 1327 (D.C. Cir. 1969), overruled on other grounds, *United States v. Gray*, 477 F.2d 444 (D.C. Cir. 1973); *United States v. Tremble*, 470 F.2d 1272 (D.C. Cir. 1972); *Robinson v. United States*, App. D.C., 388 A.2d 1210 (1978).

And crime of taking indecent liberties is lesser included offense of assault with intent to commit carnal knowledge. *Allison v. United States*, 409 F.2d 445 (D.C. Cir. 1969), overruled on other grounds, *United States v. Gray*, 477 F.2d 444 (D.C. Cir. 1973).

Taking indecent liberties with a minor is a lesser included offense of assault with intent to commit carnal knowledge. But a greater and a lesser offense will merge only if they both stem from a single criminal act, or if the lesser is committed in order to affect the greater. *Spain v. United States*, 665 A.2d 658 (D.C. App. 1995).

Merger of offenses. — Where charges of assault with intent to commit rape while armed and charges of assault with a dangerous weapon arose from the same act or transaction, the latter charge, requiring proof of 2 of the 3 elements constituting the former offense, merged with and became a lesser offense to the charge of assault with intent to commit rape while armed, barring conviction on the lesser offense. *United States v. Benn*, 476 F.2d 1127 (D.C. Cir. 1973).

Judgment convicting a defendant of assault with intent to commit rape while armed, assault with intent to commit rape, and assault

with dangerous weapon should be remanded with instructions to vacate so much of the judgment of conviction as relates to the indicted lesser-included offenses of assault with intent to commit rape and assault with dangerous weapon. *Berryman v. United States*, App. D.C., 378 A.2d 1317 (1977).

Where the indictment charged defendant with kidnapping and assault, the assault charge required the government prove the defendant's specific intent to rape; there was nothing to prohibit the government from charging both offenses, and the kidnapping charge would survive if there was an acquittal on the charge of assault with intent to rape. *Davis v. United States*, App. D.C., 613 A.2d 906 (1992).

Joinder of charges may not prejudice defendant. — Joinder of charges of rape and assault with intent to rape did not prejudice the defendant where because of unusual factual similarities between the two offenses charged, evidence of each crime would have been admissible in a separate trial of the other to show identity and motive and, in the case of the charge of assault with intent to rape, to show intent. *Crisafi v. United States*, App. D.C., 383 A.2d 1, cert. denied, 439 U.S. 931, 99 S. Ct. 322, 58 L. Ed. 2d 326 (1978).

Double Jeopardy Clause does not bar second trial where criminal defendant was successful in having his conviction set aside on grounds of trial error, after serving the sentence imposed. *Fitzgerald v. United States*, App. D.C., 472 A.2d 52 (1984).

Evidence sufficient to sustain conviction for assault with intent to commit rape. — See *United States v. Heinlein*, 490 F.2d 725 (D.C. Cir. 1973); *March v. United States*, App. D.C., 362 A.2d 691 (1976); *United States v. Jackson*, 562 F.2d 789 (D.C. Cir. 1977); *Berryman v. United States*, App. D.C., 378 A.2d 1317 (1977); *Crisafi v. United States*, App. D.C., 383 A.2d 1, cert. denied, 439 U.S. 931, 99 S. Ct. 322, 58 L. Ed. 2d 326 (1978); *Whitaker v. United States*, App. D.C., 616 A.2d 843 (1992).

Evidence sufficient for jury in prosecution for assault with intent to commit rape. — See *Robinson v. United States*, 136 F.2d 283 (D.C. Cir. 1943); *United States v. Bryant*, 420 F.2d 1327 (D.C. Cir. 1969), overruled on other grounds, *United States v. Gray*, 477 F.2d 444 (D.C. Cir. 1973).

Evidence insufficient to sustain conviction for assault with intent to commit rape. — See *Hammond v. United States*, 127 F.2d 752 (D.C. Cir. 1942).

D. With Intent to Commit Robbery.

Elements of offense. — The elements of assault with intent to commit robbery are: (1) that defendant assaulted complainant; and (2) at the time of the assault, the defendant acted

with specific intent to commit the offense of robbery upon the complainant. *Singleton v. United States*, App. D.C., 488 A.2d 1365 (1985).

Intent may be inferred. — There is no requirement that a defendant announce his intent; it is well established that the jury may infer the intent to rob from the totality of the evidence. *Singleton v. United States*, App. D.C., 488 A.2d 1365 (1985).

Person assaulted need not be same individual assailant intended to rob to support a conviction under this section. *Moore v. United States*, App. D.C., 508 A.2d 924 (1986).

It is not necessary to allege identity of person sought to be robbed where the defendant was charged with assault to commit robbery, as such information, if desired by the defendant, may be sought by a motion for a bill of particulars. *Young v. United States*, 288 F.2d 398 (D.C. Cir. 1961), cert. denied, 372 U.S. 919, 83 S. Ct. 734, 9 L. Ed. 2d 725 (1963).

Assault with dangerous weapon is lesser included offense of an assault with intent to rob while armed. *United States v. Chavis*, 476 F.2d 1137 (D.C. Cir.), rev'd on other grounds, 486 F.2d 1290 (D.C. Cir. 1973); *Quick v. United States*, App. D.C., 316 A.2d 875 (1974).

Simple assault is lesser included offense in prosecution for an assault with intent to commit robbery. *Prather v. United States*, 338 F.2d 551 (D.C. Cir. 1964).

Merger of assault counts. — A conviction of assault with a dangerous weapon may be vacated by the trial judge as having merged with a count of assault with intent to commit robbery while armed. *Forbes v. United States*, App. D.C., 390 A.2d 453 (1978).

Sentencing. — Trial judge acted permissibly in sentencing defendant, who had pled guilty to one count of assault with intent to rob while armed and two counts of armed robbery, based on the totality of the evidence surround-

ing his character and potential for rehabilitation, and did not deny defendant due process in taking into account the existence of an uncharged offense that the government, based essentially on *modus operandi*, asserted was attributable to defendant but which defendant adamantly denied. *Powers v. United States*, App. D.C., 588 A.2d 1166 (1991).

The term imposed on appellant upon resentencing for convictions of armed robbery and assault with intent to rob while armed was clearly within the statutory limits. *Johnson v. United States*, App. D.C., 628 A.2d 1009 (1993).

Evidence sufficient to support conviction for assault with intent to commit robbery. — See *Oden v. United States*, 295 F.2d 546 (D.C. Cir. 1961); *Hawkins v. United States*, 310 F.2d 849 (D.C. Cir. 1962); *Rogers v. United States*, 318 F.2d 223 (D.C. Cir. 1963); *United States v. McNair*, 433 F.2d 1132 (D.C. Cir. 1970); *In re Reeder*, App. D.C., 264 A.2d 893 (1970); *United States v. Bowles*, 488 F.2d 1307 (D.C. Cir. 1973), cert. denied, 415 U.S. 991, 94 S. Ct. 1591, 39 L. Ed. 2d 888 (1974); *Dowtin v. United States*, App. D.C., 330 A.2d 749 (1975); *Heiligh v. United States*, App. D.C., 379 A.2d 689 (1977); *Singleton v. United States*, App. D.C., 488 A.2d 1365 (1985); *Owens v. United States*, App. D.C., 497 A.2d 1086 (1985), cert. denied, 474 U.S. 1085, 106 S. Ct. 861, 88 L. Ed. 2d 900 (1986); *Jones v. United States*, App. D.C., 566 A.2d 44 (1989).

Evidence sufficient to support indictment for assault with intent to rob. — See *Blango v. United States*, App. D.C., 335 A.2d 230 (1975).

Evidence sufficient for jury in prosecution for assault with intent to commit robbery. — See *Anthony v. United States*, App. D.C., 361 A.2d 202 (1976); *Trice v. United States*, App. D.C., 662 A.2d 891 (1995).

§ 22-502. Assault with intent to commit mayhem or with dangerous weapon.

Every person convicted of an assault with intent to commit mayhem, or of an assault with a dangerous weapon, shall be sentenced to imprisonment for not more than 10 years. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 804; 1973 Ed., § 22-502.)

Cross references. — As to additional penalty for possession of firearm, see § 22-3202.

"Assault" defined. — An assault is an attempt, with force or violence, to injure another with the apparent present ability to effect injury; the offense also requires the intent to do the act constituting the assault. *Logan v. United States*, App. D.C., 460 A.2d 34 (1983).

Distinguished from simple assault. —

The factual element which divides assault with a dangerous weapon from simple assault is the use of a weapon. *Glymph v. United States*, App. D.C., 490 A.2d 1157 (1985).

Elements of assault with intent to frighten. — Trial court adequately instructed the jury on the elements required for an intent-to-frighten assault: an assault is an attempt or effort, with force or violence, to do injury to the

person of another, coupled with the apparent present ability to carry out such an attempt or effort. *Peterson v. United States*, App. D.C., 657 A.2d 756 (1995).

Assault contemplated by this section is common law assault. *Sousa v. United States*, App. D.C., 400 A.2d 1036, cert. denied, 444 U.S. 981, 100 S. Ct. 484, 62 L. Ed. 2d 408 (1979).

Modern view of mayhem relates to preservation of normal functioning of human body. *Smith v. United States*, App. D.C., 466 A.2d 429 (1983).

"Dangerous weapon" likely to produce death or great bodily harm. — A "dangerous weapon," as used in this section, is one that is likely to produce death or great bodily harm. *Josey v. United States*, 135 F.2d 809 (D.C. Cir. 1943).

An instrument capable of producing death or serious bodily injury by its manner of use qualifies as a dangerous weapon whether it is used to effect an attack or is handled with reckless disregard for the safety of others. *Powell v. United States*, App. D.C., 485 A.2d 596 (1984), cert. denied, 474 U.S. 981, 106 S. Ct. 420, 88 L. Ed. 2d 339 (1985).

Best evidence of weapon's dangerous character and of what it is capable of doing is the injury actually inflicted by it. *Freeman v. United States*, App. D.C., 391 A.2d 239 (1978).

Lye is dangerous weapon within meaning of this section. *Tatum v. United States*, 110 F.2d 555 (D.C. Cir. 1940).

And imitation or blank pistol used in an assault by pointing it at another is a "dangerous weapon" in that it is likely to produce great bodily harm. *Harris v. United States*, App. D.C., 333 A.2d 397 (1975).

Automobile as dangerous weapon. — Evidence adduced at trial permitted the jury to conclude beyond a reasonable doubt that an automobile, driven at the speeds and in the manner that defendant employed, was a dangerous weapon likely to produce death or serious bodily injury because of the wanton and reckless manner of its use in disregard of the lives and safety of others. *Powell v. United States*, App. D.C., 485 A.2d 596 (1984), cert. denied, 474 U.S. 981, 106 S. Ct. 420, 88 L. Ed. 2d 339 (1985).

Throwing of sulphuric acid in person's face constitutes assault with dangerous weapon within this section. *Bishop v. United States*, 349 F.2d 220 (D.C. Cir. 1965), cert. denied, 393 U.S. 870, 89 S. Ct. 158, 21 L. Ed. 2d 139 (1968).

Weapon need not be put in evidence at trial. — That the weapon allegedly used by the defendant in holding up the complaining witness was not recovered and put in evidence at trial did not raise a reasonable doubt, as a matter of law, as to defendant's guilt of assault

with dangerous weapon. *United States v. Curtis*, 427 F.2d 630 (D.C. Cir. 1970).

Where the government established through eyewitness testimony that a defendant was armed with a pistol during a robbery, although the pistol was not introduced into evidence at trial because it was never recovered, there was sufficient proof that defendant carried a pistol as charged, thereby establishing the "dangerous weapon" element of the offense. *Morrison v. United States*, App. D.C., 417 A.2d 409 (1980).

Assault is general intent crime. *Sousa v. United States*, App. D.C., 400 A.2d 1036, cert. denied, 444 U.S. 981, 100 S. Ct. 484, 62 L. Ed. 2d 408 (1979).

Conscious purpose to inflict injury not necessary. — This section should not be construed to require that the dangerous weapon be used with a conscious purpose to inflict an injury. *Parker v. United States*, 359 F.2d 1009 (D.C. Cir. 1966).

Elements of assault with dangerous weapon. — Three essential elements are necessary elements of assault with a dangerous weapon. First, there must be an act on the part of the defendant; mere words do not constitute an assault. The act does not have to result in injury; it can be either an actual attempt, with force or violence, to injure another, or a menacing threat, which may or may not be accompanied by a specific intent to injure, on the part of the defendant. Second, at the time the defendant commits the act, the defendant must have the apparent present ability to injure the victim. Third, at the time the act is committed, the defendant must have the intent to perform the acts which constitute the assault. *Williamson v. United States*, App. D.C., 445 A.2d 975 (1982).

For the government to prove assault with a dangerous weapon, it must prove the elements of simple assault plus the crucial fourth element — that the defendant committed an assault with a dangerous weapon. *Williamson v. United States*, App. D.C., 445 A.2d 975 (1982).

To point a dangerous weapon at another person in a menacing or threatening manner, or to use a weapon in any manner that would reasonably justify the other person in believing that the weapon might be immediately used against him, constitutes an assault with a dangerous weapon. *Peterson v. United States*, App. D.C., 657 A.2d 756 (1995).

Operability of weapon. — Operability of a weapon can be proved by circumstantial evidence. *Peterson v. United States*, App. D.C., 657 A.2d 756 (1995).

Although intent to use unlawfully is a required element in both the offense of assault with a dangerous weapon and the offense of possession of a dangerous weapon with intent to use unlawfully against another. *United States v. Brooks*, App. D.C., 330 A.2d 245 (1974); *Sousa v. United States*, App. D.C., 400

A.2d 1036, cert. denied, 444 U.S. 981, 100 S. Ct. 484, 62 L. Ed. 2d 408 (1979).

In a prosecution on charges of cruelty to a child and assault with a dangerous weapon, namely, a belt, intent is an essential element of the offenses and hence has to be proved by the prosecution beyond a reasonable doubt. *Robinson v. United States*, App. D.C., 317 A.2d 508 (1974).

A promptly corrected misstatement of an instruction by the court to the effect that no specific intent, and only general intent, need be found for a conviction on a count charging possession of a prohibited weapon was not so confusing as to prevent the fair deliberation of the defendant's innocence by a jury which convicted him of the greater offense of assault with a dangerous weapon, a general intent crime, and reached no verdict, as it was instructed, on the lesser included offense of possession of a prohibited weapon. *Darden v. United States*, App. D.C., 342 A.2d 24 (1975).

Thus drunkenness no defense. — Since a specific intent to inflict a serious injury with a weapon is not necessary under this section, drunkenness is no defense to a charge under it. *Parker v. United States*, 359 F.2d 1009 (D.C. Cir. 1966).

Consent of accused irrelevant. — In a prosecution under the federal Bank Robbery Act and this section, the consent of the accused is irrelevant when dual convictions are illegal and in excess of judicial authority. *United States v. Leek*, 665 F.2d 383 (D.C. Cir. 1981).

Assault with dangerous weapon is lesser included offense of robbery while armed. — *United States v. Johnson*, 475 F.2d 1297 (D.C. Cir. 1973); *Franey v. United States*, App. D.C., 382 A.2d 1019 (1978); *Harling v. United States*, App. D.C., 460 A.2d 571 (1983).

Where armed robberies and assaults with a dangerous weapon were committed against the same persons, the latter offenses merged into the former and the convictions on the assault charges could not stand. *United States v. Holiday*, 482 F.2d 729 (D.C. Cir. 1973); *United States v. Toy*, 482 F.2d 741 (D.C. Cir. 1973); *United States v. Thomas*, 485 F.2d 1012 (D.C. Cir. 1973); *United States v. McKinley*, 485 F.2d 1059 (D.C. Cir. 1973); *Skinner v. United States*, App. D.C., 310 A.2d 231 (1973); *Smith v. United States*, App. D.C., 312 A.2d 781 (1973); *United States v. Anderson*, 490 F.2d 785 (D.C. Cir. 1974); *United States v. Inge*, 494 F.2d 1102 (D.C. Cir. 1974); *United States v. Kearney*, 498 F.2d 61 (D.C. Cir. 1974); *United States v. Cooper*, 504 F.2d 260 (D.C. Cir. 1974); *Quick v. United States*, App. D.C., 316 A.2d 875 (1974); *Taylor v. United States*, App. D.C., 324 A.2d 683 (1974); *Forbes v. United States*, App. D.C., 390 A.2d 453 (1978); *Day v. United States*, App. D.C., 390 A.2d 957 (1978), rev'd on other

grounds sub nom. *Graves v. United States*, App. D.C., 490 A.2d 1086 (1984).

Where, though bank employees and a customer were put in fear at point of a pistol, the conduct of the defendants constituted a single continuous transaction, they could not properly be convicted and sentenced on counts of assault with a dangerous weapon and armed robbery. *United States v. Hopkins*, 464 F.2d 816 (D.C. Cir. 1972).

Assault with a dangerous weapon is a lesser included offense of robbery while armed and the 2 offenses merge when they both arise out of the same act of the defendant. *Leftwich v. United States*, App. D.C., 460 A.2d 993 (1983).

Assault with a dangerous weapon is a lesser included offense of armed robbery because all of the elements of assault with a dangerous weapon are included in armed robbery. *Norris v. United States*, App. D.C., 585 A.2d 1372 (1991).

Assault with a dangerous weapon is a lesser included offense of armed robbery and when the former is committed in order to effect the latter, the conviction for assault with a dangerous weapon merges into the conviction for armed robbery. *Norris v. United States*, App. D.C., 585 A.2d 1372 (1991).

Armed robbery and assault with a dangerous weapon merge where both offenses are committed against the same victim as part of the same criminal incident. *Morris v. United States*, App. D.C., 622 A.2d 1116, cert. denied, — U.S. —, 114 S. Ct. 270, 126 L. Ed. 2d 221 (1993).

Armed robbery charge requires proof of the taking of something of value, but assault charge does not require proof of any element not required in the armed robbery charge. *Simms v. United States*, App. D.C., 634 A.2d 442 (1993).

And of armed rape. — An assault with a dangerous weapon conviction must be vacated as a lesser included offense in armed robbery and armed rape. *United States v. Adams*, 481 F.2d 1099 (D.C. Cir. 1973); *Bell v. United States*, App. D.C., 332 A.2d 351 (1975); *Berryman v. United States*, App. D.C., 378 A.2d 1317 (1977).

Where armed assault is an essential part of the proof establishing armed rape, armed assault is a lesser offense included within the armed rape, and the assault conviction must be vacated. *United States v. Edmonds*, 524 F.2d 62 (D.C. Cir. 1975).

Assault with a dangerous weapon conviction merged with armed rape. *Johnson v. United States*, App. D.C., 613 A.2d 888 (1992).

And of assault with intent to rob while armed. — Assault with a dangerous weapon is a lesser included offense of assault with intent to rob while armed. *United States v. Chavis*, 476 F.2d 1137 (D.C. Cir.), rev'd on other

grounds, 486 F.2d 1290 (D.C. Cir. 1973); *United States v. Alston*, 483 F.2d 1264 (D.C. Cir. 1973).

Assault with a dangerous weapon was a lesser included offense of mayhem while armed. *Wynn v. United States*, App. D.C., 538 A.2d 1139 (1988).

So conviction of assault with dangerous weapon not conviction of armed robbery.

— Assault with a dangerous weapon on a motel clerk is a lesser included offense of armed robbery of the same person, and a conviction of the former may not stand as a conviction for the latter offense. *United States v. Lee*, 509 F.2d 400 (D.C. Cir. 1974), cert. denied, 420 U.S. 1006, 95 S. Ct. 1451, 43 L. Ed. 2d 765 (1975).

Assault with dangerous weapon lesser included offense of malicious disfigurement. — Where defendant was convicted of

both malicious disfigurement while armed and assault with a dangerous weapon, and where conviction for disfigurement rested upon evidence that defendant actually used the dangerous weapon with which she was armed, the caustic liquid, to inflict scars of a permanent nature, evidence supporting guilty verdict on the assault with a dangerous weapon count was a component of the proof of the greater offense of disfigurement, and to permit both convictions to stand would offend the Double Jeopardy Clause. *Curtis v. United States*, App. D.C., 568 A.2d 1074 (1990), overruled on other grounds, *Byrd v. United States*, App. D.C., 598 A.2d 386 (1991).

Assault is a lesser included offense of mayhem. *Moore v. United States*, App. D.C., 599 A.2d 1381 (1991).

Offense of assault with intent to kill while armed merges with assault with dangerous weapon where the two offenses arise out of the same act, as the latter is a lesser included offense of the former. *Leftwich v. United States*, App. D.C., 460 A.2d 993 (1983).

When offenses do not merge. — Sentences on conviction of carrying a pistol without a license and assault with a dangerous weapon may be cumulated, notwithstanding that both counts arose out of a single transaction, since the evidence militated against the conclusion that the defendant carried the pistol with the particular purpose in mind of using it to inflict an injury but rather portrayed a sudden flare-up and a precipitous resort to the pistol during verbal affray. *United States v. Lucas*, 441 F.2d 1056 (D.C. Cir. 1971).

Evidence was sufficient to sustain conviction for assault with a deadly weapon charged as separate and distinct from an armed robbery offense. *Dixon v. United States*, App. D.C., 320 A.2d 318 (1974); *Davis v. United States*, App. D.C., 367 A.2d 1254 (1976), cert. denied, 434 U.S. 847, 98 S. Ct. 154, 54 L. Ed. 2d 114 (1977).

In a prosecution for armed robbery and for assault with a dangerous weapon, trial court

did not erroneously permit the jury to return a separate verdict on assault with a dangerous weapon charge, where the evidence disclosed that after the armed robbery of the cash register of the store the defendant forced the victim at gunpoint to walk to the rear of the store where she was searched and, on leaving, the defendant warned the victim about the possibility of being shot if she came out before the defendant got out of the store. *Bates v. United States*, App. D.C., 327 A.2d 542 (1974).

Where, in the course of an armed robbery, a shotgun was pointed at two distinct individuals at different times, there was no error in entering separate judgments of conviction of armed robbery and assault with a dangerous weapon. *Borrero v. United States*, App. D.C., 332 A.2d 363 (1975).

Imposition of consecutive sentences for assault with a dangerous weapon and for carrying a dangerous weapon is proper, notwithstanding that the offenses arose out of the same transaction, since the offense of carrying a dangerous weapon requires proof that the weapon was unlicensed while the offense of assault with a dangerous weapon does not. *Hammond v. United States*, App. D.C., 345 A.2d 140 (1975).

Convictions of both assault with a dangerous weapon and simple assault were sustained where there were two separate assaults, each proved by different evidence, despite the contention that the conviction of simple assault should be vacated because it merged into the conviction of assault with a dangerous weapon. *Tuckson v. United States*, App. D.C., 364 A.2d 138 (1976).

Joinder in an indictment of counts charging a defendant with assault with a dangerous weapon and possession of a pistol without a license is proper, where each count is directed to a different facet of one continuous occurrence, and thus constitutes a "series of acts" within the meaning of rule governing joinder of offenses. *Barker v. United States*, App. D.C., 373 A.2d 1215 (1977).

An assault with a dangerous weapon committed by one defendant who, while armed with a shotgun, threatened and warned robbery victims to return to their apartment building when the victims attempted to follow robbers, was separate and distinct from an assault with the intent to commit robbery while armed committed immediately previous to the warning, and, thus, the former offense did not merge into the latter. *Heiligh v. United States*, App. D.C., 379 A.2d 689 (1977).

The offenses of assault with intent to commit mayhem and assault with a dangerous weapon do not merge where evidence shows that these offenses arose from separate acts at different times. *Logan v. United States*, App. D.C., 460 A.2d 34 (1983).

A defendant can be convicted of both at-

tempted robbery while armed and assault with a dangerous weapon arising out of the same incident where the offenses were directed against different victims. *Adams v. United States*, App. D.C., 466 A.2d 439 (1983).

Conviction for assault with a dangerous weapon did not merge into convictions for assault with intent to kidnap while armed. When the plan to kidnap the victim went sour, and the victim broke free and ran, the offense of assault on the victim with intent to kidnap while armed had ended and the subsequent shooting of the victim invaded a separate interest, and thus constituted a separate offense. *United States v. Rodriguez*, 115 WLR 2729 (Super. Ct. 1987).

Where assault with a dangerous weapon and armed robbery are triggered by separate acts, merger is precluded. But in order to separate the charges, the defendant must have completed one crime and have begun another. *Norris v. United States*, App. D.C., 585 A.2d 1372 (1991).

Kidnapping of victim D, kidnapping of victim E, assault of victim H with a dangerous weapon, and assault of victim J with a dangerous weapon all concerned different victims. Accordingly, no merger occurred between any of these counts. *Hanna v. United States*, 666 A.2d 845 (D.C. App. 1995).

First degree burglary while armed count did not merge with kidnapping, armed robbery, or assault with dangerous weapon counts because burglary requires proof of an element (entry into a dwelling with criminal intent) that the other first incident crimes do not. Kidnapping (victim was seized or detained), armed robbery (property of value was taken), and assault with a dangerous weapon (forceful or violent attempt to inflict bodily harm) all require proof of elements that burglary does not. *Hanna v. United States*, 666 A.2d 845 (D.C. App. 1995).

And dismissal of one offense does not require dismissal of other. — Where a juvenile, who had stopped at roadblock but, on spying an opening, swerved toward the opening and an approaching officer, with the officer leaping to safety as the vehicle brushed his trousers, was charged with assault on a police officer and assault with a dangerous weapon, i.e., the automobile, dismissal of the count charging assault on a police officer did not also require dismissal of the charge of assault with a dangerous weapon. In re *J.A.H.*, App. D.C., 315 A.2d 825 (1974).

Nor does acquittal on one require acquittal on other. — The fact that a jury acquitted the defendant on the charge of carrying a dangerous weapon did not require them to find the defendant not guilty on a charge of assault with a deadly weapon. *Winters v. United States*, App. D.C., 317 A.2d 530 (1974).

Possession of firearm during commission of violent offense and assault with a dangerous weapon distinguished. — To convict a person of possession of a firearm during commission of a violent offense, the government must show possession of a firearm, while to convict of assault with a dangerous weapon, the government must show that a weapon — any dangerous weapon — was used to commit an assault. Each offense requires proof of an element that the other does not, and each offense addresses a distinct societal interest, so there is no merger of the two criminal statutes. *Freeman v. United States*, App. D.C., 600 A.2d 1070 (1991).

No double jeopardy where offenses not merged. — Separate consecutive sentences of 18 months to five years for robbery, and one to three years for assault with a dangerous weapon did not violate the Double Jeopardy Clause of the Fifth Amendment since conviction of each offense requires proof of a fact which the other does not. *Floyd v. United States*, App. D.C., 538 A.2d 248 (1988).

Indictment not fatally deficient. — Although assault with intent to maim and maliciously disfigure does not appear in the statute, indictment containing this charge, with parenthetical reference to the specific statute on which the prosecution was based, was not fatally deficient since it apprised defendant of the nature of the accusation against him in a manner which would preclude a future prosecution against him based on the same averments. *Smith v. United States*, App. D.C., 466 A.2d 429 (1983).

Instruction on lesser included offense of assault may be necessary. — A defendant accused of assault with a dangerous weapon is entitled to an instruction on simple assault, as a lesser included offense, if a foundation for it is found in the evidence. *Greenfield v. United States*, 341 F.2d 411 (D.C. Cir. 1964); *Parker v. United States*, 359 F.2d 1009 (D.C. Cir. 1966).

Same act directed against multiple victims deemed single offense. — Where, by a single act or course of action, a defendant has put in fear different members of a group toward which the action is collectively directed, he is guilty of but one offense, as multiple convictions and consecutive sentences are appropriate only where distinct, successive assaults have been committed upon the individual victims. *United States v. Alexander*, 471 F.2d 923 (D.C. Cir.), cert. denied, 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494 (1972).

Where the evidence discloses a single act on the part of a defendant directed simultaneously at two persons, so that only a single conviction for assault on two persons was supported by evidence, convictions of first degree burglary and of one assault would be affirmed, but a conviction of an additional assault would be set

aside. *United States v. Carmichael*, 469 F.2d 937 (D.C. Cir. 1972).

Except if victims members of different classes. — The evidence sustained the determination that assaults with dangerous weapons upon persons other than bank tellers, committed in connection with a bank robbery, were separate assaults rather than a single group assault. *United States v. Cooper*, 504 F.2d 260 (D.C. Cir. 1974).

Key factor in determining whether separate sentences may be imposed. — In a prosecution under the federal Bank Robbery Act and this section, Congressional intent is the key factor in determining whether separate sentences may be imposed for multiple offenses arising out of a single criminal transaction. *United States v. Leek*, 665 F.2d 383 (D.C. Cir. 1981).

Applicability of § 22-3202(a). — To allow application of the Enhancement of Conviction Statute (while armed) to a charge of involuntary manslaughter causes an inherent conflict between the two convictions; and where the "weapon" involved is an automobile, the inappropriateness of enhancement of an involuntary manslaughter conviction as "while armed" is manifest. *Reed v. United States*, App. D.C., 584 A.2d 585 (1990).

Sentencing under § 22-3202(a)(2) of defendant convicted under this section. — A defendant convicted of assault with a deadly weapon, who has previously been convicted of a crime of violence, may be sentenced under § 22-3202(a)(2) even though § 22-3202(a)(1) may not be applied to assault with a deadly weapon. *McCall v. United States*, App. D.C., 449 A.2d 1095 (1982).

Sentence exceeding maximum vacated. — Where a defendant was convicted of assault with intent to kill and two counts of assault with a dangerous weapon, and received a general sentence of five to fifteen years, which is the maximum permitted for assault with intent to kill, but more than the maximum with respect to the other two counts of the indictment, the sentence was vacated and the case remanded for resentencing. *United States v. Straite*, 425 F.2d 594 (D.C. Cir. 1970); *United States v. Wimbush*, 475 F.2d 347 (D.C. Cir. 1973).

No treatment under Narcotic Addict Rehabilitation Act. — A defendant, who was convicted of assault with a dangerous weapon, was properly denied treatment under the Narcotic Addict Rehabilitation Act since he was convicted of a crime of violence. *United States v. Fitzgerald*, 466 F.2d 377 (D.C. Cir. 1972).

But juvenile may be sentenced under Youth Corrections Act. — A conviction of a juvenile of first degree felony-murder, armed robbery, assault with a dangerous weapon, assault upon a police officer with a dangerous

weapon and carrying a dangerous weapon would be remanded to consider the possibility of sentencing under the former Federal Youth Corrections Act (18 U.S.C. § 5005 et seq., repealed by Pub. L. 98-473, 98 Stat. 2027, effective October 12, 1984). *United States v. Howard*, 449 F.2d 1086 (D.C. Cir. 1971).

Trial court's imposition of condition of restitution, as part of a sentence imposed upon a defendant convicted of assault with a deadly weapon and possession of a pistol without a license, is not contrary to this section nor an abuse of the trial court's sentencing discretion. *Barker v. United States*, App. D.C., 373 A.2d 1215 (1977).

Maximum sentence not cruel and unusual. — A sentence of 10 years imprisonment and a refusal to commit the defendant to an institution for treatment of sexual psychopathy did not constitute cruel and unusual punishment of the defendant after a conviction of sodomy and assault with a dangerous weapon. *Hughes v. United States*, App. D.C., 308 A.2d 238 (1973).

Corroboration for certain offenses abolished. — Corroboration in sex offenses (or where the sexual nature of the touching makes it an assault, see, e.g., *Beausoliel v. United States*, 107 F.2d 292 (D.C. Cir. 1939)), is abolished prospectively from the date of this opinion (Oct. 17, 1985). *Gary v. United States*, App. D.C., 499 A.2d 815 (1985), cert. denied sub nom. *Cole v. United States*, 475 U.S. 1086, 106 S. Ct. 1470, 89 L. Ed. 2d 725, cert. denied, 477 U.S. 906, 106 S. Ct. 3279, 90 L. Ed. 2d 568 (1986).

Evidence of prior gun possession and threats held admissible without cautionary instruction. — In trial involving charges for fatal shooting, failure of trial court sua sponte to give any cautionary instruction on the prior gun possession and prior threats evidence was not plain error, where the relevance of the evidence was properly noted by counsel in their closing arguments, where its relationship to issues before the jury was not complex or confused, and where defense counsel's decision not to request a cautionary instruction was clearly consistent with his trial strategy. *Jones v. United States*, App. D.C., 477 A.2d 231 (1984).

Evidence sufficient to sustain conviction for assault with dangerous weapon. — *MacIllrath v. United States*, 188 F.2d 1009 (D.C. Cir. 1951); *Rowe v. United States*, 370 F.2d 240 (D.C. Cir. 1966); *Adams v. United States*, 413 F.2d 411 (D.C. Cir. 1969); *Allen v. United States*, 420 F.2d 223 (D.C. Cir. 1969); *In re Bumphus*, App. D.C., 254 A.2d 400 (1969); *United States v. Skinner*, 425 F.2d 552 (D.C. Cir. 1970); *United States v. Wolford*, 444 F.2d 876 (D.C. Cir. 1971); *United States v. Lumpkin*, 448 F.2d 1085 (D.C. Cir. 1971); *United States v. James*, 452 F.2d 1375 (D.C. Cir. 1971); *United States v. McCall*, 460 F.2d 952 (D.C. Cir. 1972);

United States v. Prater, 462 F.2d 292 (D.C. Cir. 1972); United States v. Carmichael, 469 F.2d 937 (D.C. Cir. 1972); Robinson v. United States, App. D.C., 317 A.2d 508 (1974); In re W.K., App. D.C., 323 A.2d 442 (1974); United States v. Jones, 517 F.2d 176 (D.C. Cir. 1975); Borrero v. United States, App. D.C., 332 A.2d 363 (1975); Blango v. United States, App. D.C., 335 A.2d 230 (1975); Brown v. United States, App. D.C., 372 A.2d 557, cert. denied, 434 U.S. 921, 98 S. Ct. 397, 54 L. Ed. 2d 278 (1977); Heiligh v. United States, App. D.C., 379 A.2d 689 (1977); Johnson v. United States, App. D.C., 386 A.2d 710 (1978); Smith v. United States, App. D.C., 466 A.2d 429 (1983); Murchison v. United States, App. D.C., 486 A.2d 77 (1984); Owens v. United States, App. D.C., 497 A.2d 1086 (1985), cert. denied, 474 U.S. 1085, 106 S. Ct. 861, 88 L. Ed. 2d 900 (1986); Belton v. United States, App. D.C., 581 A.2d 1205 (1990); Foreman v. United States, App. D.C., 633 A.2d 792 (1993).

There was ample evidence that defendants used their guns "in a menacing and threatening manner" toward others so that each could reasonably believe that the weapon might be immediately used against him. This evidence was sufficient to support a conviction of assault with a dangerous weapon. *Butler v. United States*, App. D.C., 614 A.2d 875, cert. denied, 506 U.S. 1009, 113 S. Ct. 625, 121 L. Ed. 2d 558 (1992).

Evidence sufficient to present question for jury as to assault with dangerous weapon. — See *Dean v. United States*, 314 F.2d 250 (D.C. Cir. 1962); *United States v. Harris*, 435 F.2d 74 (D.C. Cir. 1970), cert. denied, 402 U.S. 986, 91 S. Ct. 1675, 29 L. Ed. 2d 152 (1971); *United States v. Coombs*, 464 F.2d 842 (D.C. Cir. 1972); *Smith v. United States*, App. D.C., 343 A.2d 40 (1975).

Evidence insufficient for aiding and abetting conviction. — The evidence of aiding and abetting was insufficient to sustain defendant's conviction of assault with a dangerous weapon. *Jones v. United States*, App. D.C., 625 A.2d 281 (1993).

Cited in *Beausoliel v. United States*, 107 F.2d 292 (D.C. Cir. 1939); *Cooke v. United States*, 275 F.2d 887 (D.C. Cir. 1960); *Dean v. United States*, 314 F.2d 250 (D.C. Cir. 1962); *Ramey v. United States*, 336 F.2d 743 (D.C. Cir.), cert. denied, 379 U.S. 840, 85 S. Ct. 79, 13 L. Ed. 2d 47 (1964); *Battle v. United States*, 345 F.2d 438 (D.C. Cir. 1965); *Scurry v. United States*, 347 F.2d 468 (D.C. Cir. 1965), cert. denied, 389 U.S. 883, 88 S. Ct. 139, 19 L. Ed. 2d 179 (1967); *Davenport v. United States*, 353 F.2d 882 (D.C. Cir. 1965); *Harris v. United States*, 364 F.2d 701 (D.C. Cir. 1966); *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966); *Harley v. United States*, 377 F.2d 172 (D.C. Cir. 1967); *United States v. Suggs*, 269 F. Supp. 732 (D.D.C. 1967); *Bates v. United States*, 405 F.2d 1104 (D.C. Cir. 1968); *Banks v. United States*,

414 F.2d 1150 (D.C. Cir. 1969); *Walker v. United States*, 418 F.2d 1116 (D.C. Cir. 1969); *United States v. Hamilton*, 420 F.2d 1292 (D.C. Cir. 1969); *United States v. Grimes*, 421 F.2d 1119 (D.C. Cir. 1969), cert. denied, 398 U.S. 932, 90 S. Ct. 1831, 26 L. Ed. 2d 98 (1970); *United States v. York*, 426 F.2d 1191 (D.C. Cir. 1969); *United States v. Weaver*, 422 F.2d 711 (D.C. Cir. 1970); *United States v. Bailey*, 426 F.2d 1236 (D.C. Cir. 1970); *United States v. Shumate*, 429 F.2d 777 (D.C. Cir. 1970); *United States v. Johnson*, 432 F.2d 626 (D.C. Cir.), cert. denied, 400 U.S. 949, 91 S. Ct. 257, 27 L. Ed. 2d 255 (1970); *Sutton v. United States*, 434 F.2d 462 (D.C. Cir. 1970), cert. denied, 402 U.S. 988, 91 S. Ct. 1676, 29 L. Ed. 2d 153 (1971); *United States v. Wilson*, 434 F.2d 494 (D.C. Cir. 1970); *United States v. Queen*, 435 F.2d 66 (D.C. Cir. 1970); *Young v. United States*, 435 F.2d 405 (D.C. Cir. 1970); *United States v. Lewis*, 435 F.2d 417 (D.C. Cir. 1970); *United States v. Spadoni*, 435 F.2d 448 (D.C. Cir. 1970); *United States v. Carter*, 436 F.2d 200 (D.C. Cir. 1970); *United States v. Free*, 437 F.2d 631 (D.C. Cir. 1970); *United States v. Daniels*, 437 F.2d 656 (D.C. Cir. 1970); *United States v. Harris*, 437 F.2d 686 (D.C. Cir. 1970); *United States v. Waters*, 437 F.2d 722 (D.C. Cir. 1970); *United States v. Garner*, 439 F.2d 525 (D.C. Cir. 1970), cert. denied, 402 U.S. 930, 91 S. Ct. 1531, 28 L. Ed. 2d 864 (1971); *United States v. Rollerson*, 308 F. Supp. 1014 (D.D.C. 1970), aff'd, 449 F.2d 1000 (D.C. Cir. 1971); *United States v. York*, 321 F. Supp. 539 (D.D.C. 1970), aff'd, 440 F.2d 252 (D.C. Cir. 1971); *United States v. Nichols*, 440 F.2d 222 (D.C. Cir. 1971); *United States v. Gaither*, 440 F.2d 262 (D.C. Cir. 1971); *United States v. Hinkle*, 448 F.2d 1157 (D.C. Cir. 1971); *United States v. Wyatt*, 442 F.2d 858 (D.C. Cir. 1971); *United States v. Trantham*, 448 F.2d 1036 (D.C. Cir. 1971); *United States v. Rollerson*, 449 F.2d 1000 (D.C. Cir. 1971); *United States v. Wilson*, 449 F.2d 1005 (D.C. Cir. 1971); *United States v. Skeens*, 449 F.2d 1066 (D.C. Cir. 1971); *United States v. Thomas*, 449 F.2d 1177 (D.C. Cir. 1971); *United States v. Porcha*, 450 F.2d 697 (D.C. Cir. 1971); *United States v. Thomas*, 450 F.2d 1355 (D.C. Cir. 1971); *United States v. Mizzell*, 452 F.2d 1328 (D.C. Cir. 1971); *United States v. Honesty*, 459 F.2d 1279 (D.C. Cir. 1971); *United States v. Parman*, 461 F.2d 1203 (D.C. Cir. 1971); *Bland v. Rodgers*, 332 F. Supp. 989 (D.D.C. 1971); *Wooten v. United States*, App. D.C., 285 A.2d 308 (1971); *United States v. Jones*, 459 F.2d 1225 (D.C. Cir. 1972); *United States v. Moore*, 459 F.2d 1360 (D.C. Cir. 1972); *United States v. Lee*, 459 F.2d 1365 (D.C. Cir. 1972); *United States v. King*, 461 F.2d 152 (D.C. Cir. 1972); *United States v. Ruth*, 461 F.2d 1213 (D.C. Cir. 1972); *United States v. Sheppard*, 462 F.2d 279 (D.C. Cir.), cert. denied, 409 U.S. 985, 93 S. Ct. 335, 34 L. Ed. 2d 250 (1972); *United States v.*

Bradley, 463 F.2d 808 (D.C. Cir. 1972); *United States v. Neverson*, 463 F.2d 1224 (D.C. Cir. 1972); *United States v. Simms*, 463 F.2d 1273 (D.C. Cir. 1972); *United States v. Thompson*, 465 F.2d 583 (D.C. Cir. 1972); *United States v. Parish*, 468 F.2d 1129 (D.C. Cir. 1972), cert. denied, 410 U.S. 957, 93 S. Ct. 1430, 35 L. Ed. 2d 690 (1973); *United States v. Canty*, 469 F.2d 114 (D.C. Cir. 1972); *United States v. Dixon*, 469 F.2d 940 (D.C. Cir. 1972); *United States v. Hill*, 470 F.2d 361 (D.C. Cir. 1972); *United States v. Wilson*, 471 F.2d 1072 (D.C. Cir. 1972), cert. denied, 410 U.S. 957, 93 S. Ct. 1431, 35 L. Ed. 2d 691 (1973); *United States v. Raymond*, 337 F. Supp. 641 (D.D.C. 1972), aff'd sub nom. *United States v. Addison*, 498 F.2d 741 (D.C. Cir. 1974); *Williams v. United States*, App. D.C., 295 A.2d 503 (1972); *White v. United States*, App. D.C., 297 A.2d 766 (1972); *United States v. Carter*, 475 F.2d 349 (D.C. Cir. 1973); *United States v. Harris*, 475 F.2d 359 (D.C. Cir. 1973); *United States v. Benn*, 476 F.2d 1127 (D.C. Cir. 1973); *United States v. Maynard*, 476 F.2d 1170 (D.C. Cir. 1973); *United States v. Person*, 478 F.2d 659 (D.C. Cir. 1973); *United States v. Hawkins*, 480 F.2d 1151 (D.C. Cir. 1973); *United States v. Lewis*, 482 F.2d 632 (D.C. Cir. 1973); *Paul v. United States*, App. D.C., 301 A.2d 226 (1973); *Adams v. United States*, App. D.C., 302 A.2d 232 (1973); *United States v. Bowles*, App. D.C., 304 A.2d 277 (1973); *Burleson v. United States*, App. D.C., 306 A.2d 659 (1973); *United States v. Addison*, 498 F.2d 741 (D.C. Cir. 1974); *United States v. Calloway*, 505 F.2d 311 (D.C. Cir. 1974); *United States v. Rosenbloom*, 511 F.2d 777 (D.C. Cir. 1974); *Crawley v. United States*, App. D.C., 314 A.2d 487 (1974); *Davis v. United States*, App. D.C., 315 A.2d 157 (1974); *Smith v. United States*, App. D.C., 315 A.2d 163, cert. denied, 419 U.S. 896, 95 S. Ct. 174, 42 L. Ed. 2d 139 (1974); *Villines v. United States*, App. D.C., 320 A.2d 313 (1974); *Shelton v. United States*, App. D.C., 323 A.2d 717 (1974); *Jefferson v. United States*, App. D.C., 328 A.2d 85 (1974); *Edwards v. United States*, App. D.C., 328 A.2d 90 (1974); *United States v. Bridgeman*, 523 F.2d 1099 (D.C. Cir. 1975), cert. denied, 425 U.S. 961, 96 S. Ct. 1744, 48 L. Ed. 2d 206 (1976); *United States v. Thorne*, 527 F.2d 840 (D.C. Cir. 1975); *Holt v. United States*, App. D.C., 340 A.2d 827 (1975); *Hyman v. United States*, App. D.C., 342 A.2d 43 (1975); *Washington v. United States*, App. D.C., 343 A.2d 560 (1975); *United States v. Sedgwick*, App. D.C., 345 A.2d 465, application denied, 423 U.S. 1028, 96 S. Ct. 558, 46 L. Ed. 2d 402 (1975), cert. denied, 425 U.S. 966, 96 S. Ct. 1751, 48 L. Ed. 2d 210 (1976); *United States v. Snyder*, 529 F.2d 871 (D.C. Cir. 1976); *United States v. Masters*, 539 F.2d 721 (D.C. Cir. 1976); *Randall v. United States*, App. D.C., 353 A.2d 12 (1976); *Hazel v. United States*, App. D.C., 353 A.2d 280 (1976); *Goins v. United*

States, App. D.C., 353 A.2d 298 (1976); *Thornton v. United States*, App. D.C., 357 A.2d 429, cert. denied, 429 U.S. 1024, 97 S. Ct. 644, 50 L. Ed. 2d 626 (1976); *White v. United States*, App. D.C., 358 A.2d 645 (1976); *Hale v. United States*, App. D.C., 361 A.2d 212 (1976); *Watts v. United States*, App. D.C., 362 A.2d 706 (1976); *Ward v. United States*, App. D.C., 365 A.2d 378 (1976); *Johnson v. United States*, App. D.C., 366 A.2d 429 (1976); *Walden v. United States*, App. D.C., 366 A.2d 1075 (1976); *Hill v. United States*, App. D.C., 367 A.2d 110 (1976); *Gillespie v. United States*, App. D.C., 368 A.2d 1136 (1977); *Harris v. United States*, App. D.C., 377 A.2d 34 (1977); *Horton v. United States*, App. D.C., 377 A.2d 390 (1977); *Byrd v. United States*, App. D.C., 377 A.2d 400 (1977); *Jackson v. United States*, App. D.C., 377 A.2d 1151 (1977); *Washington v. United States*, App. D.C., 377 A.2d 1348 (1977); *Adams v. United States*, App. D.C., 379 A.2d 961 (1977); *Cates v. United States*, App. D.C., 379 A.2d 968 (1977); *Taylor v. United States*, App. D.C., 380 A.2d 989 (1977); *Bridges v. United States*, App. D.C., 381 A.2d 1073 (1977), cert. denied, 439 U.S. 842, 99 S. Ct. 135, 58 L. Ed. 2d 141 (1978); *United States v. Day*, 591 F.2d 861 (D.C. Cir. 1978); *Nowlin v. United States*, App. D.C., 382 A.2d 9 (1978); *Harling v. United States*, App. D.C., 382 A.2d 845 (1978); *Chambers v. United States*, App. D.C., 383 A.2d 343 (1978); *Crosby v. United States*, App. D.C., 383 A.2d 351, cert. denied, 439 U.S. 849, 99 S. Ct. 152, 58 L. Ed. 2d 152 (1978); *Brown v. United States*, App. D.C., 383 A.2d 1082 (1978); *Wright v. United States*, App. D.C., 387 A.2d 582 (1978); *Brown v. United States*, App. D.C., 388 A.2d 451 (1978); *Webb v. United States*, App. D.C., 388 A.2d 857 (1978); *Smith v. United States*, App. D.C., 389 A.2d 1364 (1978); *Adair v. United States*, App. D.C., 391 A.2d 288 (1978); *Scott v. United States*, App. D.C., 392 A.2d 4 (1978); *Smith v. United States*, App. D.C., 392 A.2d 990 (1978); *Evans v. United States*, App. D.C., 392 A.2d 1015 (1978); *Peoples v. United States*, App. D.C., 395 A.2d 41 (1978), cert. denied, 442 U.S. 911, 99 S. Ct. 2826, 61 L. Ed. 2d 277 (1979); *Ross v. Lawson*, App. D.C., 395 A.2d 54 (1978); *Harvey v. United States*, App. D.C., 395 A.2d 92 (1978), cert. denied, 441 U.S. 936, 99 S. Ct. 2061, 60 L. Ed. 2d 665 (1979); *Jackson v. United States*, App. D.C., 395 A.2d 99 (1978); *Ellis v. United States*, App. D.C., 395 A.2d 404 (1978), cert. denied, 442 U.S. 913, 99 S. Ct. 2830, 61 L. Ed. 2d 280 (1979); *Fields v. United States*, App. D.C., 396 A.2d 522 (1978); *Fields v. United States*, App. D.C., 396 A.2d 990 (1979); *In re W.B.W.*, App. D.C., 397 A.2d 143 (1979); *Oesby v. United States*, App. D.C., 398 A.2d 1 (1979); *Johnson v. United States*, App. D.C., 398 A.2d 354 (1979); *Vance v. United States*, App. D.C., 399 A.2d 52 (1979); *Mitchell v. United States*, App. D.C., 399 A.2d 866 (1979); *Middleton v. United States*,

App. D.C., 401 A.2d 109 (1979); *Jones v. United States*, App. D.C., 401 A.2d 473 (1979); *Letsinger v. United States*, App. D.C., 402 A.2d 411 (1979); *Roberts v. United States*, App. D.C., 402 A.2d 441 (1979); *Morgan v. United States*, App. D.C., 402 A.2d 598 (1979); *Rouse v. United States*, App. D.C., 402 A.2d 1218 (1979); *Rease v. United States*, App. D.C., 403 A.2d 322 (1979); *Sullivan v. United States*, App. D.C., 404 A.2d 153 (1979); *Khaalis v. United States*, App. D.C., 408 A.2d 313 (1979), cert. denied, 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781 (1980); *Williams v. United States*, App. D.C., 408 A.2d 996 (1979); *Jackson v. United States*, App. D.C., 420 A.2d 1202 (1979); *United States v. Crews*, 445 U.S. 463, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980); *United States v. Wood*, 628 F.2d 554 (D.C. Cir. 1980); *Cosgrove v. United States*, App. D.C., 411 A.2d 57 (1980); *Fowler v. United States*, App. D.C., 411 A.2d 618, cert. denied, 446 U.S. 985, 100 S. Ct. 2967, 64 L. Ed. 2d 841 (1980); *Williams v. United States*, App. D.C., 412 A.2d 17 (1980); *Cooper v. United States*, App. D.C., 415 A.2d 528 (1980); *Pegues v. United States*, App. D.C., 415 A.2d 1374 (1980); *Rogers v. United States*, App. D.C., 419 A.2d 977 (1980); *Bundy v. United States*, App. D.C., 422 A.2d 765 (1980); *Streater v. United States*, App. D.C., 429 A.2d 173 (1980), cert. denied and appeal dismissed, 451 U.S. 902, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981); *Washington v. United States*, App. D.C., 434 A.2d 394 (1980); *United States v. Garnett*, 653 F.2d 558 (D.C. Cir. 1981); *Ball v. United States*, App. D.C., 429 A.2d 1353 (1981); *Clayton v. United States*, App. D.C., 429 A.2d 1381 (1981); *United States v. Nunzio*, App. D.C., 430 A.2d 1372 (1981); *Hilton v. United States*, App. D.C., 435 A.2d 383 (1981); *Smith v. United States*, App. D.C., 435 A.2d 1066 (1981), cert. denied, 455 U.S. 950, 102 S. Ct. 1454, 71 L. Ed. 2d 665 (1982); *Asbell v. United States*, App. D.C., 436 A.2d 804 (1981); *Warren v. United States*, App. D.C., 436 A.2d 821 (1981); *Sweet v. United States*, App. D.C., 438 A.2d 447 (1981); *United States v. Green*, 680 F.2d 183 (D.C. Cir. 1982), cert. denied, 459 U.S. 1210, 103 S. Ct. 1204, 75 L. Ed. 2d 445 (1983); *Perkins v. United States*, App. D.C., 446 A.2d 19 (1982); *Green v. United States*, App. D.C., 446 A.2d 402 (1982); *Sweet v. United States*, App. D.C., 449 A.2d 315 (1982); *Keitt v. United States*, App. D.C., 450 A.2d 461 (1982); *McPhaul v. United States*, App. D.C., 452 A.2d 371 (1982); *Benjamin v. United States*, App. D.C., 453 A.2d 810 (1982); *Smith v. United States*, App. D.C., 454 A.2d 822 (1983); *Washington v. United States*, App. D.C., 461 A.2d 1037 (1983); *Gordon v. United States*, App. D.C., 466 A.2d 1226 (1983); *Lewis v. United States*, App. D.C., 466 A.2d 1234 (1983); *Bruce v. United States*, App. D.C., 471 A.2d 1005 (1984); *Logan v. United States*, App. D.C., 483 A.2d 664 (1984); *Allen v. United States*, App.

D.C., 495 A.2d 1145 (1985); *Ramirez v. United States*, App. D.C., 499 A.2d 451 (1985); *Snipes v. United States*, App. D.C., 507 A.2d 159 (1986); *Scutchings v. United States*, App. D.C., 509 A.2d 634 (1986); *Arnold v. United States*, App. D.C., 511 A.2d 399 (1986); *Williams v. United States*, App. D.C., 521 A.2d 663 (1987); *Settles v. United States*, App. D.C., 522 A.2d 348 (1987); *Watson v. United States*, App. D.C., 524 A.2d 736 (1987); *Briggs v. United States*, App. D.C., 525 A.2d 583 (1987); *Wilson v. United States*, App. D.C., 528 A.2d 876 (1987); *United States v. Jackson*, App. D.C., 528 A.2d 1211 (1987); *Waller v. United States*, App. D.C., 531 A.2d 994 (1987); *Shepard v. United States*, App. D.C., 533 A.2d 1278 (1987); *Johnson v. United States*, App. D.C., 537 A.2d 555 (1988); *Lewis v. United States*, App. D.C., 541 A.2d 145 (1988); *Horton v. United States*, App. D.C., 541 A.2d 604 (1988); *Johnson v. United States*, App. D.C., 544 A.2d 270 (1988); *In re L.J.*, App. D.C., 546 A.2d 429 (1988); *Bellanger v. United States*, App. D.C., 548 A.2d 501 (1988); *Sanders v. United States*, App. D.C., 550 A.2d 343 (1988); *Byrd v. United States*, App. D.C., 551 A.2d 96 (1988), cert. denied, 493 U.S. 968, 110 S. Ct. 415, 107 L. Ed. 2d 380 (1989); *District of Columbia Dep't of Cors. v. Teamsters Union Local 246*, App. D.C., 554 A.2d 319 (1989); *Legrand v. United States*, App. D.C., 570 A.2d 786 (1990); *Nelson v. United States*, App. D.C., 580 A.2d 114 (1990); *Rice v. United States*, App. D.C., 580 A.2d 119 (1990); *Harper v. United States*, App. D.C., 582 A.2d 485 (1990); *Edwards v. United States*, App. D.C., 583 A.2d 661 (1990); *Lumpkin v. United States*, App. D.C., 586 A.2d 701, cert. denied, 502 U.S. 849, 112 S. Ct. 151, 116 L. Ed. 2d 116 (1991); *Chang Yoon v. United States*, App. D.C., 594 A.2d 1056 (1991), amended, App. D.C., 610 A.2d 1388 (1992); *Joseph v. United States*, App. D.C., 597 A.2d 14 (1991), cert. denied, 504 U.S. 928, 112 S. Ct. 1988, 118 L. Ed. 2d 585 (1992); *United States v. Hobbs*, 119 WLR 673 (Super. Ct. 1991); *United States v. Harris*, 959 F.2d 246 (D.C. Cir.), cert. denied, 506 U.S. 932, 113 S. Ct. 362, 121 L. Ed. 2d 275 (1992); *Swanson v. United States*, App. D.C., 602 A.2d 1102 (1992); *Taylor v. United States*, App. D.C., 603 A.2d 451, cert. denied, 506 U.S. 852, 113 S. Ct. 155, 121 L. Ed. 2d 105 (1992); *Martin v. United States*, App. D.C., 606 A.2d 120 (1991); *Hawkins v. United States*, App. D.C., 606 A.2d 753 (1992); *Harper v. United States*, App. D.C., 608 A.2d 152 (1992); *Burgess v. United States*, App. D.C., 608 A.2d 733 (1992); *Bond v. United States*, App. D.C., 614 A.2d 892 (1992); *Whitaker v. United States*, App. D.C., 616 A.2d 843 (1992); *Farmer v. United States*, App. D.C., 616 A.2d 1241 (1992), cert. denied, — U.S. —, 113 S. Ct. 1958, 123 L. Ed. 2d 661 (1993); *Bruce v. United States*, App. D.C., 617 A.2d 986 (1992), cert. denied, — U.S. —, 113 S. Ct. 1878, 123 L. Ed.

2d 496 (1993); *United States v. Turner*, 121 WLR 105 (Super. Ct. 1992); *United States v. Harris*, App. D.C., 629 A.2d 481 (1993); *Carpenter v. United States*, App. D.C., 635 A.2d 1289 (1993); *United States v. Maiden*, 870 F. Supp. 359 (D.D.C. 1994); *Martin v. United States*,

App. D.C., 647 A.2d 1135 (1994); *Riley v. United States*, App. D.C., 647 A.2d 1165 (1994); *Jackson v. United States*, App. D.C., 650 A.2d 659 (1994); *United States v. Flynn*, 122 WLR 1021 (Super. Ct. 1994); *Harris v. United States*, App. D.C., 668 A.2d 839 (1995).

§ 22-503. Assault with intent to commit any other offense.

Whoever assaults another with intent to commit any other offense which may be punished by imprisonment in the penitentiary shall be imprisoned not more than 5 years. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 805; 1973 Ed., § 22-503.)

Cross references. — As to additional penalty for possession of firearm, see § 22-3202.

Section references. — This section is referred to in §§ 22-4107, 22-4111, and 22-4112.

Force may be applied directly or indirectly. — The application of force, or the threat of application thereof, in an assault may be made indirectly as well as directly. *Beausoliel v. United States*, 107 F.2d 292 (D.C. Cir. 1939).

Burden of proving unlawfulness of touch. — In a prosecution for unlawfully assaulting a 15-year-old girl, the burden was on the government to prove not only a touching, but also that such touching was unlawful or, in other words, that the touching was not accidental or innocent. *Davenport v. United States*, App. D.C., 60 A.2d 226 (1948).

Possession of a firearm during a crime of violence. — Even though defendant was acquitted of assault with a dangerous weapon, he could still be found guilty of possession of a firearm during a crime of violence, in violation of § 22-3204(b). *Ransom v. United States*, App. D.C., 630 A.2d 170 (1993).

Assault with intent to commit sodomy is not lesser-included offense of rape where perpetrated against a mature female. *Sweet v. United States*, App. D.C., 449 A.2d 315 (1982).

Assault on a person with intent to commit a crime against another. — The assault and its aggravating intent to commit another crime need not be directed to the same person. *Battle v. United States*, App. D.C., 515 A.2d 1120 (1986).

Assault with intent to commit murder. — This section is construed to include the offense of assault with intent to murder. This construction gives effect to Congress' intention in enacting § 16-2301(3)(A) "to authorize the prosecution of certain juveniles as adults only when they are charged with an assault committed with a malicious intent to kill." *United States v. Hobbs*, App. D.C., 594 A.2d 66 (1991).

Reversal of conviction not warranted. — Inaccurate testimony given to a grand jury by a police officer was not sufficiently prejudicial to warrant reversal of conviction for assault with

a dangerous weapon and carrying a pistol without a license, where there was other testimony for the grand jury to rely on. *Hunter v. United States*, App. D.C., 590 A.2d 1048 (1991).

Merger. — Conviction for assault with a dangerous weapon did not merge into convictions for assault with intent to kidnap while armed. When the plan to kidnap the victim went sour, and the victim broke free and ran, the offense of assault on the victim with intent to kidnap while armed had ended and the subsequent shooting of the victim invaded a separate interest, and thus constituted a separate offense. *United States v. Rodriguez*, 115 WLR 2729 (Super. Ct. 1987).

Corroboration for certain offenses abolished. — Corroboration in sex offenses (or where the sexual nature of the touching makes it an assault, see, e.g., *Beausoliel v. United States*, 107 F.2d 292 (D.C. Cir. 1939)), is abolished prospectively from the date of this opinion (Oct. 17, 1985). *Gary v. United States*, App. D.C., 499 A.2d 815 (1985), cert. denied sub nom. *Cole v. United States*, 475 U.S. 1086, 106 S. Ct. 1470, 89 L. Ed. 2d 725, cert. denied, 477 U.S. 906, 106 S. Ct. 3279, 90 L. Ed. 2d 568 (1986).

Requirement of corroboration abrogated in prosecutions for assault with intent to commit sodomy where the complainant is a mature female. *Sweet v. United States*, App. D.C., 449 A.2d 315 (1982).

Separate concurrent sentences for assault with intent to commit rape and assault with intent to commit sodomy, when the conduct took place within a short period of time, and in a confined area, did not violate the Double Jeopardy Clause, since the single transaction gave rise to distinct offenses under separate statutes. *Robinson v. United States*, App. D.C., 501 A.2d 1273 (1985).

Failure to instruct on consent as defense to charge of assault with intent to commit sodomy held harmless error. — See *Jenkins v. United States*, App. D.C., 506 A.2d 1120, cert. denied, 479 U.S. 845, 107 S. Ct. 160, 93 L. Ed. 2d 99 (1986).

Instruction on transferred intent. — There was no plain error in the giving of a transferred intent instruction where there were victims other than the intended victim. *Brooks v. United States*, App. D.C., 655 A.2d 844 (1995).

Evidence held sufficient to support separate convictions under this section, former § 22-3502, and §§ 22-501, and 22-2101. — See *Robinson v. United States*, App. D.C., 501 A.2d 1273 (1985).

Cited in *Polen v. United States*, 41 App. D.C. 4 (1913); *Posey v. United States*, App. D.C., 41 A.2d 300 (1945); *United States v. Schoefield*, 465 F.2d 560 (D.C. Cir.), cert. denied, 409 U.S. 881, 93 S. Ct. 210, 34 L. Ed. 2d 136 (1972); *Horton v. United States*, App. D.C., 377 A.2d 390 (1977); *Morgan v. United States*, App. D.C.,

402 A.2d 598 (1979); *Warren v. United States*, App. D.C., 436 A.2d 821 (1981); *Logan v. United States*, App. D.C., 483 A.2d 664 (1984); *Abrams v. United States*, App. D.C., 531 A.2d 964 (1987); *Brewer v. United States*, App. D.C., 559 A.2d 317 (1989), cert. denied, 493 U.S. 1092, 110 S. Ct. 1163, 107 L. Ed. 2d 1066 (1990); *Scutchings v. United States*, App. D.C., 570 A.2d 1197 (1990); *Marrow v. United States*, App. D.C., 592 A.2d 1042 (1991); *Taylor v. United States*, App. D.C., 603 A.2d 451, cert. denied, 506 U.S. 852, 113 S. Ct. 155, 121 L. Ed. 2d 105 (1992); *Hawkins v. United States*, App. D.C., 606 A.2d 753 (1992); *Morris v. United States*, App. D.C., 622 A.2d 1116, cert. denied, — U.S. —, 114 S. Ct. 270, 126 L. Ed. 2d 221 (1993); *Howard v. United States*, App. D.C., 656 A.2d 1106 (1995).

§ 22-504. Assault or threatened assault in a menacing manner; stalking.

(a) Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than \$1,000 or be imprisoned not more than 180 days, or both.

(b) Any person who on more than 1 occasion engages in conduct with the intent to cause emotional distress to another person or places another person in reasonable fear of death or bodily injury by willfully, maliciously, and repeatedly following or harassing that person, or who, without a legal purpose, willfully, maliciously, and repeatedly follows or harasses another person, is guilty of the crime of stalking and shall be fined not more than \$500 or be imprisoned not more than 12 months, or both. Constitutionally protected activity, such as conduct by a party to a labor dispute in furtherance of labor or management objectives in that dispute, is not included within the meaning of this definition.

(c) Any person who violates subsection (b) of this section when there is in effect a court order imposing a temporary restraining order, an injunction, a temporary protection order, civil protection order, stay-away or no contact order, civil restraining order, or any combination thereof, prohibiting contact between that person and the individual who is the victim of the conduct described in subsection (b) of this section shall be subject to the penalties set forth therein and in addition shall be required to give bond, for a period not exceeding 1 year, to ensure compliance with the provisions of this section.

(d) A second conviction occurring within 2 years of a first conviction for an offense under subsection (b) or (c) of this section, or for a similar offense under the law of any other jurisdiction, shall result in a fine of up to 1½ times the maximum fines authorized for the offenses in subsections (b) and (c) of this section and imprisonment for a term of up to 1½ times the maximum term of imprisonment authorized for the offense. If such person was previously convicted more than once of an offense described in subsection (b) or (c) of this section, such person may be subject to a fine of up to 3 times the maximum fines authorized for the offenses in subsections (b) and (c) of this section and

imprisonment for a term of up to 3 times the maximum term of imprisonment authorized for each offense. No conviction with respect to which a person has been pardoned on the grounds of innocence shall be taken into account in applying this section.

(e) For the purpose of this section, the term "harassing" means engaging in a course of conduct either in person, by telephone, or in writing, directed at a specific person, which seriously alarms, annoys, frightens, or torments the person, or engaging in a course of conduct either in person, by telephone, or in writing, which would cause a reasonable person to be seriously alarmed, annoyed, frightened, or tormented. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 806; 1973 Ed., § 22-504; May 8, 1993, D.C. Law 9-269, § 2, 39 DCR 9014; Nov. 17, 1993, D.C. Law 10-53, § 2, 40 DCR 5446; Aug. 20, 1994, D.C. Law 10-151, § 105(d), 41 DCR 2608; May 16, 1995, D.C. Law 10-255, § 16, 41 DCR 5193.)

Section references. — This section is referred to in §§ 6-2313 and 23-581.

Effect of amendments. — D.C. Law 10-53 added (b) through (e).

D.C. Law 10-151, in (a), substituted "\$1,000" for "\$500" and substituted "180 days" for "12 months."

D.C. Law 10-255 validated a previously made change in (c).

Emergency act amendments. — For temporary amendment of section, see § 105(d) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 9-269. — Law 9-269, the "Anti-Stalking Temporary Amendment of 1992," was introduced in Council and assigned Bill No. 9-659. The Bill was adopted on first and second readings on October 6, 1992, and November 4, 1992, respectively. Signed by the Mayor on November 23, 1992, it was assigned Act No. 9-317 and transmitted to both Houses of Congress for its review. D.C. Law 9-269 became effective on May 8, 1993.

Legislative history of Law 10-53. — Law 10-53, the "Anti-Stalking Amendment Act of 1993," was introduced in Council and assigned Bill No. 10-42, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on June 1, 1993, and June 29, 1993, respectively. Signed by the Mayor on July 16, 1993, it was assigned Act No. 10-46 and transmitted to both Houses of Congress for its review. D.C. Law 10-53 became effective on November 17, 1993.

Legislative history of Law 10-151. — Law 10-151, the "Omnibus Criminal Justice Reform Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to

both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

Legislative history of Law 10-255. — Law 10-255, the "Technical Amendments Act of 1994," was introduced in Council and assigned Bill No. 10-673, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on June 21, 1994, and July 5, 1994, respectively. Signed by the Mayor on July 25, 1994, it was assigned Act No. 10-302 and transmitted to both Houses of Congress for its review. D.C. Law 10-255 became effective May 16, 1995.

Assault contemplated by this section is common law assault. *Guarro v. United States*, 237 F.2d 578 (D.C. Cir. 1956); *Allison v. United States*, App. D.C., 623 A.2d 590 (1993).

"Assault" at common law is an attempt with force or violence to do a corporal injury to another and may consist of any act tending to such corporal injury, accompanied with such circumstances as denote at the time an intention, coupled with a present ability, of using actual violence against the person. *Guarro v. United States*, 237 F.2d 578 (D.C. Cir. 1956); *Jones v. United States*, App. D.C., 401 A.2d 473 (1979); *Goudy v. United States*, App. D.C., 495 A.2d 744 (1985).

Elements of offense. — There are 3 essential elements which constitute the criminal offense of assault under this section. First, there must be an act on the part of the defendant; mere words do not constitute an assault. The act does not have to result in injury; it can be either an actual attempt, with force or violence, to injure another, or a menacing threat, which may or may not be accompanied by a specific intent to injure, on the part of the defendant. Second, at the time the defendant commits the act, the defendant must have the apparent present ability to injure the victim. Third, at the time the act is committed, the defendant must have the intent to perform the

acts which constitute the assault. *Williamson v. United States*, App. D.C., 445 A.2d 975 (1982).

Police officers acting within scope of authority. — A police officer, acting within the scope of his or her authority while making (or attempting to make) an arrest, cannot be guilty of an assault, provided that the officer acts in good faith. *Allison v. United States*, App. D.C., 623 A.2d 590 (1993).

There are 2 distinct kinds of criminal assault: The “attempted-battery” type, which requires proof of an attempt to cause a physical injury, and the “intent-to-frighten” or “tort” type, which requires proof of intent either to cause injury or to create apprehension in the victim by threatening conduct. *Robinson v. United States*, App. D.C., 506 A.2d 572 (1986).

One who alleges an assault under this section must prove either an attempt to cause physical injury or an intent to frighten the victim. *Allison v. United States*, App. D.C., 623 A.2d 590 (1993).

Violence in its ordinary meaning is not necessary element of an assault, as an attempt to do unlawfully to another any bodily injury, however small, constitutes an “assault.” *Harris v. United States*, App. D.C., 201 A.2d 532 (1964); *Hall v. United States*, App. D.C., 400 A.2d 1063 (1979).

Distinguished from assault with dangerous weapon. — The factual element which divides assault with a dangerous weapon from simple assault is the use of a weapon. *Glymph v. United States*, App. D.C., 490 A.2d 1157 (1985).

Force may be applied directly or indirectly. — The application of force, or a threat of the application thereof, in an assault may be made indirectly as well as directly. *Beausoliel v. United States*, 107 F.2d 292 (D.C. Cir. 1939).

Intent. — The sexual touching doctrine is not designed to protect an individual from the specific intent of another individual, but from unwanted roving hands; accordingly, in the heterosexual context, specific lustful intent is unnecessary. In re A.B., App. D.C., 556 A.2d 645 (1989).

Assault a general intent crime. — The offense of assault, whether the “attempted-battery” type or the “intent-to-frighten” type, remains a general intent crime which may be proved by a showing that a defendant intended to do the acts which constitute the assault. *Smith v. United States*, App. D.C., 593 A.2d 205 (1991).

Prosecution to prove criminal intent. — In an assault prosecution, it is incumbent upon the prosecutor to show that the act of the defendant was not accidental and that he had the necessary criminal intent. *Dyson v. United States*, App. D.C., 97 A.2d 135 (1953).

Intent to use pistol unlawfully would necessarily encompass an intent to com-

mit either of the two types of assault recognized under local law. *McGee v. United States*, App. D.C., 533 A.2d 1268 (1987).

And issue of criminal responsibility for trier of fact. — Whether a defendant, who is charged with assault, public intoxication and disorderly conduct, has a mental disease which should excuse him from criminal responsibility is an issue of ultimate fact for the trier thereof. *Dempsey v. United States*, App. D.C., 251 A.2d 650 (1969).

Acts constituting sexual touching. — Unconsented to nonviolent touching of the buttocks constituted a sexual touching and was sufficient to support a conviction under this section. In re A.B., App. D.C., 556 A.2d 645 (1989).

Unless there is consent, sexual touching is sufficiently offensive to constitute an assault. *Guarro v. United States*, 237 F.2d 578 (D.C. Cir. 1956).

Nonviolent action involving sexual misconduct may constitute assault because the sexual nature of the conduct supplies the missing element of violence or threat of violence. In re L.A.G., App. D.C., 407 A.2d 688 (1979).

Prosecution for assault may be sustained under this section for homosexual overture. *Henderson v. United States*, App. D.C., 117 A.2d 456 (1955).

No one can commit an indecent act without also committing an assault. *Hall v. United States*, App. D.C., 400 A.2d 1063 (1979).

Touching must be without consent. — A case of assault by a man touching another man's genital organ with an invitation to a homosexual act can be made out only by proof that the complaining witness did not consent. *McDermett v. United States*, App. D.C., 98 A.2d 287 (1953).

Grabbing children. — Where defendant repeatedly grabbed children in a menacing manner, a reasonable decision-maker could find him guilty of assault. *Holmes v. United States*, App. D.C., 615 A.2d 555 (1992).

Acquiescence or submission to assault by minor immaterial. — Where a 13-year-old boy committed an indecent act upon a girl 4 years and 8 months old, the act clearly constituted an assault, since the child's acquiescence or submission is immaterial. In re Lewis, App. D.C., 88 A.2d 582 (1952).

Consent is of no significance in sexual assaults on mental incompetents. *Goudy v. United States*, App. D.C., 495 A.2d 744 (1985).

Where defendant was apprehended while engaging in sexual intercourse with complainant, the conduct clearly constituted an assault, as its sexual nature supplied the element of violence or threat of violence. *Goudy v. United States*, App. D.C., 495 A.2d 744 (1985).

Testimony of complaining witness in prosecution for assault need not be corroborated. *Ingram v. United States*, App. D.C., 110 A.2d 693 (1955).

Corroboration for certain offenses abolished. — Corroboration in sex offenses (or where the sexual nature of the touching makes it an assault, see, e.g., *Beausoliel v. United States*, 107 F.2d 292 (D.C. Cir. 1939)), is abolished prospectively from the date of this opinion (Oct. 17, 1985). *Gary v. United States*, App. D.C., 499 A.2d 815 (1985), cert. denied sub nom. *Cole v. United States*, 475 U.S. 1086, 106 S. Ct. 1470, 89 L. Ed. 2d 725, cert. denied, 477 U.S. 906, 106 S. Ct. 3279, 90 L. Ed. 2d 568 (1986).

But that of child treated with caution. — In a prosecution for an assault of a homosexual nature upon a child, the child's accusation against the defendant must be treated with great caution and the government's proof must be of the most convincing kind. *Konvalinka v. United States*, App. D.C., 162 A.2d 778 (1960), aff'd, 287 F.2d 346 (D.C. Cir. 1961).

Where the sole underlying basis of a nonviolent assault is its character as a sexual crime and where the complainant is a child, legal precedent in this jurisdiction requires corroborative evidence. *In re L.A.G.*, App. D.C., 407 A.2d 688 (1979).

Threat or danger of physical suffering in ordinary sense is not necessary; the injury suffered by the innocent victim may be the fear, shame, humiliation, and mental anguish caused by the assault. *Beausoliel v. United States*, 107 F.2d 292 (D.C. Cir. 1939); *In re A.B.*, App. D.C., 556 A.2d 645 (1989).

The fact that a police officer specifically denied being hurt, embarrassed or humiliated by an alleged touching of his private parts does not negate assault. *Guarro v. United States*, 237 F.2d 578 (D.C. Cir. 1956).

Criminal assault encompasses such conduct as could induce in the victim a well-founded apprehension of peril. *Williamson v. United States*, App. D.C., 445 A.2d 975 (1982).

Spitting on another is an assault punishable under this section. — Spitting on another person, although minor, is highly offensive, and since it is an application of force to the body of the victim, it is an assault punishable under this section. *Ray v. United States*, App. D.C., 575 A.2d 1196 (1990).

Proof of threats in menacing manner by words alone does not suffice under this section. *In re D.W.J.*, App. D.C., 293 A.2d 268 (1972).

Right of self-defense no justification for aggressor's first use of force. — When one is the aggressor in an altercation, he cannot rely upon the right of self-defense to justify his first use of force. *Martin v. United States*, App. D.C., 452 A.2d 360 (1982).

Effect of use of "indecent" in indictment.

— Where a defendant is charged with committing an "indecent assault" upon a girl 4 years and 8 months old and the laws in the jurisdiction make an unlawful assault a misdemeanor and do not use term "indecent assault," addition of the word "indecent" to the charge can be treated as surplusage and neither adding to nor detracting from the charge. *In re Lewis*, App. D.C., 88 A.2d 582 (1952).

Counts of assault and possession of prohibited weapon do not merge. — Consecutive sentences are properly imposed on a defendant who is convicted of simple assault and possession of prohibited weapon, notwithstanding that both offenses arose out of his attack on his wife, where the government has to prove that the defendant attempted to inflict bodily injury and did not have to prove possession of the weapon in order to sustain the assault charge, while the weapon charge, on the other hand, requires proof of possession of the weapon but does not require evidence of an attempt to harm. *Cooke v. United States*, App. D.C., 213 A.2d 508 (1965); *Jones v. United States*, App. D.C., 401 A.2d 473 (1979).

Defendant's conviction of assault and of possession of a prohibited weapon, both offenses arising out of the same incident, does not result in double jeopardy, since each offense demanded proof of an essential element not needed in the other. *Walden v. United States*, App. D.C., 351 A.2d 515 (1976).

Assault deemed lesser included offense of assault on police officer. *Petway v. United States*, App. D.C., 420 A.2d 1211 (1980); *McDonald v. United States*, App. D.C., 496 A.2d 274 (1985).

Simple assault is not lesser included offense of obstruction of justice and thus a charge of simple assault does not merge into an accused's conviction of obstruction of justice. *Hall v. United States*, App. D.C., 343 A.2d 35 (1975).

When mistaken arrest not assault. — If an officer has reason to believe that the person he is about to arrest is a desperate character and acts accordingly, the officer is not to be convicted of assault because it subsequently develops that he was mistaken. *Barrett v. United States*, 64 F.2d 148 (D.C. Cir. 1933).

No aggregation of misdemeanors to reach threshold required for jury trial. — The Superior Court would not aggregate the penalties for multiple misdemeanor offenses charged in order to reach the threshold penalty required for a jury trial. *United States v. Joseph*, 122 WLR 2337 (Super. Ct. 1994).

Instruction concerning right of one acting in loco parentis to use reasonable disciplinary measures. — In order to be entitled to a jury instruction on the right of one acting in loco parentis to use reasonable disciplinary

measures, 2 issues must be fairly raised by the evidence. First, there must be evidence that the aggressor stood in loco parentis to the child, and second, there must be evidence upon which a jury could conclude that reasonable discipline was used under the circumstances. *Martin v. United States*, App. D.C., 452 A.2d 360 (1982).

Aiding and abetting instructions. — The facts were sufficient to support an aiding and abetting instruction in a prosecution for simple assault. *Bayer v. United States*, App. D.C., 651 A.2d 308 (1994).

Self-defense instructions. — The trial court should give a self-defense jury instruction if there is an evidentiary basis in the record to support it. A defendant's decision, however, to establish different or even contradictory defenses does not jeopardize the availability of a self-defense jury instruction, so long as self-defense is reasonably raised by the evidence. *Guillard v. United States*, App. D.C., 596 A.2d 60 (1991).

Where the only offense charged is simple assault under this section, the government is entitled to the limited self-defense instruction as set forth in *Speed v. United States*, 562 A.2d 124 (1989). *Robinson v. United States*, App. D.C., 649 A.2d 584 (1994).

Jury instructions upheld. — Instruction to jury that second element of the offense was "that the defendant had at least from the victim's viewpoint at the time of the commission of the offense, the apparent present ability to carry out such an act or assault" was proper. *Smith v. United States*, App. D.C., 593 A.2d 205 (1991).

Errors in the instructions did not prejudice appellant in any manner; in fact, appellant was afforded a greater right of self-defense than that to which he was entitled under the law where he was ultimately acquitted of the charge of assault on a police officer (APO), and, as to the lesser-included offense of simple assault, the jury was instructed that the government had to prove an additional element that was not required to sustain a conviction for simple assault, that is, that appellant knew the person assaulted was a police officer engaged in official police duties. Consequently, appellant's chance for acquittal was enhanced by the instruction that the jury should acquit appellant of both APO and simple assault if it found that appellant did not know that the complainant was a police officer. *Robinson v. United States*, App. D.C., 649 A.2d 584 (1994).

Severance of charges required. — Evidence of murder and attempted murder occurring one week after incident leading to simple assault charge would have created an extreme risk of prejudice, if admitted at a trial of the simple assault, no matter what instructions the judge gave regarding the limited use of the evidence; thus, the charges should have been

severed. *Parks v. United States*, App. D.C., 656 A.2d 1137, cert. denied, — U.S. —, 116 S. Ct. 198, 133 L. Ed. 2d 133 (1995).

Refusal to sever counts involving more than one victim not error. — Given the interest in judicial efficiency, the trial court did not abuse its discretion in refusing to sever count of assault against one victim from charge of murdering a second victim. *Bowler v. United States*, App. D.C., 480 A.2d 678 (1984).

Acquittal by reason of insanity of lesser included offense of assault. — Where the trial court found every fact required for conviction of the lesser included offense of assault, a predicate offense for an insanity verdict was established, and a judgment of acquittal of rape by reason of insanity was modified so as to state that defendant was adjudged not guilty by reason of insanity of the lesser included offense of assault. *Goudy v. United States*, App. D.C., 495 A.2d 744 (1985).

Evidence of complainant's prior assaultive conduct was not admissible. *Frost v. United States*, App. D.C., 618 A.2d 653 (1992).

Evidence deemed irrelevant. — Evidence regarding the nature of the bar where the subject incident occurred was of little, if any, relevance. *Frost v. United States*, App. D.C., 618 A.2d 653 (1992).

State of mind evidence. — In cases involving domestic violence, evidence of previous hostility between spouses or lovers may be of particular relevance to show motive and intent and therefore will be admissible under the state of mind exception. *Garibay v. United States*, App. D.C., 634 A.2d 946 (1993).

Evidence sufficient for jury on question of assault. — See *Harris v. United States*, App. D.C., 201 A.2d 532 (1964); *Durham v. United States*, App. D.C., 237 A.2d 830 (1968).

Evidence sufficient to sustain conviction for assault. — See *Hensley v. United States*, App. D.C., 155 A.2d 77 (1959), aff'd, 281 F.2d 605 (D.C. Cir. 1960); *Mahoney v. United States*, App. D.C., 243 A.2d 684 (1968); *Dempsey v. United States*, App. D.C., 251 A.2d 650 (1969); *Matthews v. United States*, App. D.C., 267 A.2d 826 (1970), cert. denied, 404 U.S. 884, 92 S. Ct. 221, 30 L. Ed. 2d 166 (1971); *Riley v. United States*, App. D.C., 291 A.2d 190 (1972); *Womack v. United States*, App. D.C., 350 A.2d 381 (1976); *Robinson v. United States*, App. D.C., 506 A.2d 572 (1986); *Cantizano v. United States*, App. D.C., 614 A.2d 870 (1992); *Mihav v. United States*, App. D.C., 618 A.2d 197 (1992).

Assault conviction, predicated upon homosexual overture, sustained. — See *Henderson v. United States*, App. D.C., 117 A.2d 456 (1955).

Evidence sufficient to sustain conviction for threatening another in menacing

manner. — In re D.W.J., App. D.C., 293 A.2d 268 (1972).

Evidence held insufficient to support a conviction of attempted-battery assault. McGee v. United States, App. D.C., 533 A.2d 1268 (1987).

Evidence insufficient to sustain conviction for indecent assault upon police officer. — See Thomas v. United States, App. D.C., 129 A.2d 852 (1957).

Cited in Martin v. United States, 127 F.2d 865 (D.C. Cir. 1942); Stitely v. United States, App. D.C., 61 A.2d 491 (1948); Varrella v. United States, App. D.C., 64 A.2d 310 (1949); Humphries v. United States, App. D.C., 68 A.2d 803 (1949); Evans v. United States, App. D.C., 83 A.2d 876 (1951); Williams v. United States, App. D.C., 104 A.2d 828 (1954); Hale v. United States, App. D.C., 114 A.2d 74 (1955); Day v. United States, App. D.C., 148 A.2d 462 (1959); Yeldell v. United States, App. D.C., 153 A.2d 637 (1959); Bandoni v. United States, App. D.C., 171 A.2d 748 (1961); Rogers v. United States, App. D.C., 174 A.2d 356 (1961); King v. United States, App. D.C., 177 A.2d 912 (1962); Williams v. United States, App. D.C., 190 A.2d 269 (1963); Broughman v. United States, 361 F.2d 71 (D.C. Cir. 1966); United States v. Kennedy, App. D.C., 220 A.2d 322 (1966); Duncan v. United States, 379 F.2d 148 (D.C. Cir. 1967); United States v. Foster, App. D.C., 226 A.2d 164 (1967); Thomas v. United States, App. D.C., 229 A.2d 155 (1967); Smith v. United States, App. D.C., 235 A.2d 574 (1967); Hines v. United States, App. D.C., 237 A.2d 827 (1968); Tuttle v. United States, App. D.C., 238 A.2d 590 (1968); Thompkins v. United States, App. D.C., 251 A.2d 636 (1969); Shehyn v. United States, App. D.C., 256 A.2d 404 (1969); Gressette v. United States, App. D.C., 256 A.2d 418 (1969); United States v. Jefferson, App. D.C., 257 A.2d 225 (1969); Scott v. United States, App. D.C., 259 A.2d 353 (1969), appeal denied, 427 F.2d 609 (D.C. Cir. 1970); Bell v. United States, App. D.C., 260 A.2d 690 (1970); United States v. Perry, 449 F.2d 1026 (D.C. Cir. 1971); Davis v. United States, App. D.C., 272 A.2d 106 (1971); Marksman v. United States, App. D.C., 275 A.2d 241 (1971); McIntyre v. United States, App. D.C., 283 A.2d 814 (1971); Davis v. United States, App. D.C., 313 A.2d 884 (1974); Medina v. United States, App. D.C., 315 A.2d 169 (1974); United States v. Simpson, App. D.C., 330 A.2d 756 (1975); Tuckson v. United States, App. D.C., 364 A.2d 138 (1976); Brooks v. United States, App. D.C., 367 A.2d 1297 (1976); Lucas v. United States, 443 F. Supp. 539 (D.D.C. 1977), aff'd, 590 F.2d 356 (D.C. Cir. 1979); United States v. Bolden, App. D.C., 381 A.2d 624 (1977); United States v. Dixon, 446 F. Supp. 58 (D.D.C. 1978); Jackson v. United States, App. D.C., 385 A.2d 786 (1978); Moore v. United States, App. D.C., 387 A.2d 714 (1978);

Day v. United States, App. D.C., 390 A.2d 957 (1978), rev'd on other grounds sub nom. Graves v. United States, App. D.C., 490 A.2d 1086 (1984); Washington v. United States, App. D.C., 397 A.2d 946 (1979); Duddles v. United States, App. D.C., 399 A.2d 59 (1979); United States v. Ellis, App. D.C., 408 A.2d 971 (1979); Mitchell v. United States, App. D.C., 408 A.2d 1213 (1979); Wright v. United States, App. D.C., 418 A.2d 146 (1980); Moore v. United States, App. D.C., 428 A.2d 364 (1981); Ball v. United States, App. D.C., 429 A.2d 1353 (1981); Hawkins v. United States, App. D.C., 434 A.2d 446 (1981); McBride v. United States, App. D.C., 441 A.2d 644 (1982); Musgrove v. United States, App. D.C., 441 A.2d 980 (1982); Lewis v. United States, App. D.C., 466 A.2d 1234 (1983); Thorne v. United States, App. D.C., 471 A.2d 247 (1983); Haynesworth v. United States, App. D.C., 473 A.2d 366 (1984); Moreno v. United States, App. D.C., 482 A.2d 1233 (1984), cert. denied, 469 U.S. 1226, 105 S. Ct. 1222, 84 L. Ed. 2d 362 (1985); Ramirez v. United States, App. D.C., 499 A.2d 451 (1985); United States v. Potter, 664 F. Supp. 551 (D.D.C. 1986); Settles v. United States, App. D.C., 522 A.2d 348 (1987); Murray v. United States, App. D.C., 532 A.2d 120 (1987); Shivers v. United States, App. D.C., 533 A.2d 258 (1987); Potter v. United States, App. D.C., 534 A.2d 943 (1987); Sweat v. United States, App. D.C., 540 A.2d 460 (1988); Doby v. United States, App. D.C., 550 A.2d 919 (1988); Spann v. United States, App. D.C., 551 A.2d 1347 (1988); Williams v. United States, App. D.C., 551 A.2d 1353 (1989); Williams v. United States, App. D.C., 552 A.2d 510 (1988); District of Columbia Dep't of Cors. v. Teamsters Union Local 246, App. D.C., 554 A.2d 319 (1989); Franklin v. United States, App. D.C., 555 A.2d 1010 (1989); Brewer v. United States, App. D.C., 559 A.2d 317 (1989), cert. denied, 493 U.S. 1092, 110 S. Ct. 1163, 107 L. Ed. 2d 1066 (1990); Townsend v. United States, App. D.C., 559 A.2d 1319 (1989); Speed v. United States, App. D.C., 562 A.2d 124 (1989); In re S.B., 117 WLR 1 (Super. Ct. 1989); Belcher v. United States, App. D.C., 572 A.2d 453 (1990); In re E.D.P., App. D.C., 573 A.2d 1307 (1990); Nelson v. United States, App. D.C., 580 A.2d 114 (1990); Strong v. United States, App. D.C., 581 A.2d 383 (1990); Comber v. United States, App. D.C., 584 A.2d 26 (1990); United States v. Hobbs, 119 WLR 673 (Super. Ct. 1991); United States v. Daramola, 119 WLR 1009 (Super. Ct. 1991); McGrier v. United States, App. D.C., 597 A.2d 36 (1991); Annetti v. United States, App. D.C., 600 A.2d 387 (1991); Arthur v. United States, App. D.C., 602 A.2d 174 (1992); Price v. United States, App. D.C., 602 A.2d 641 (1992); Lopez v. United States, App. D.C., 615 A.2d 1140 (1992); United States v. Dixon, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993); Edwards v. United States, App. D.C., 619 A.2d

33 (1993); *United States v. Bellamy*, App. D.C., 619 A.2d 515 (1993); *Wood v. United States*, App. D.C., 622 A.2d 67 (1993); *Finley v. United States*, App. D.C., 632 A.2d 102 (1993).

§ 22-504.1. Aggravated assault.

(a) A person commits the offense of aggravated assault if:

(1) By any means, that person knowingly or purposely causes serious bodily injury to another person; or

(2) Under circumstances manifesting extreme indifference to human life, that person intentionally or knowingly engages in conduct which creates a grave risk of serious bodily injury to another person, and thereby causes serious bodily injury.

(b) Any person convicted of aggravated assault shall be fined not more than \$10,000 or be imprisoned for not more than 10 years, or both.

(c) Any person convicted of attempted aggravated assault shall be fined not more than \$5,000 or be imprisoned for not more than 5 years, or both. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 806a, as added Aug. 20, 1994, D.C. Law 10-151, § 202, 41 DCR 2608.)

Effect of amendments. — D.C. Law 10-151 added this section.

Emergency act amendments. — For temporary addition of section, see § 202 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — Law 10-151, the “Omnibus Criminal Justice Reform Amendment Act of 1994,” was introduced in

Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

§ 22-505. Assault on member of police force, campus or university special police, or fire department.

(a) Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with any officer or member of any police force operating in the District of Columbia, including any campus or university special police officer, or any officer or member of any fire department operating in the District of Columbia; or any officer or employee of any penal or correctional institution of the District of Columbia, or any officer or employee of the government of the District of Columbia charged with the supervision of juveniles being confined pursuant to law in any facility of the District of Columbia, whether such institution or facility is located within the District of Columbia or elsewhere, while engaged in or on account of the performance of his or her official duties, shall be fined not more than \$5,000 or imprisoned not more than 5 years, or both. It is neither justifiable nor excusable cause for a person to use force to resist an arrest when such arrest is made by an individual he or she has reason to believe is a law enforcement officer, whether or not such arrest is lawful.

(b) Whoever in the commission of any such acts uses a deadly or dangerous weapon shall be imprisoned not more than 10 years. (R.S., D.C., § 432; June 29, 1953, 67 Stat. 95, ch. 159, § 205; Oct. 20, 1965, 79 Stat. 1011, Pub. L.

89-277, § 1; July 29, 1970, 84 Stat. 601, Pub. L. 91-358, title II, § 206; Aug. 11, 1971, 85 Stat. 316, Pub. L. 92-92; 1973 Ed., § 22-505; May 21, 1994, D.C. Law 10-119, § 3, 41 DCR 1639; Oct. 18, 1995, D.C. Law 11-63, § 3, 42 DCR 4109.)

Cross references. — As to minimum sentence of 1 year for violation of section, see § 24-203.

Section references. — This section is referred to in §§ 23-524 and 24-203.

Effect of amendments. — D.C. Law 10-119, in (a), substituted “his or her” for “his” in the first sentence and “he or she” for “he” in the second sentence.

D.C. Law 11-63 inserted “including any campus or university special police officer” in the first sentence of (a).

Legislative history of Law 10-119. — Law 10-119, the “Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Legislative history of Law 11-63. — Law 11-63, the “College and University Campus Security Amendment Act of 1995,” was introduced in Council and assigned Bill No. 11-152, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on June 20, 1995, and July 11, 1995, respectively. Signed by the Mayor on July 25, 1995, it was assigned Act No. 11-120 and transmitted to both Houses of Congress for its review. D.C. Law 11-63 became effective on October 18, 1995.

Construction. — As applied to defendant this section can be construed to prohibit individuals from physically opposing District juvenile supervisors. This construction is consistent with the plain language of the section, eliminates free speech and assembly concerns, and sufficiently clarifies the standard of conduct required by the section, and is not unconstitutionally vague or overbroad. In re E.D.P., App. D.C., 573 A.2d 1307 (1990).

Subsection (a) can be narrowly construed to apply to physical conduct rather than speech. In re E.D.P., App. D.C., 573 A.2d 1307 (1990).

In order to convict person of assault on police officer, the government must prove the elements of a simple assault, plus the additional element that the “defendant knew or should have known” the victim was a police officer. *Petway v. United States*, App. D.C., 420 A.2d 1211 (1980); *Nelson v. United States*, App. D.C., 580 A.2d 114 (1990).

The fact that the defendant knew or should have known that the complainants were police officers is an element of the offense of assault on a police officer with a dangerous weapon. *Fletcher v. United States*, App. D.C., 335 A.2d 248 (1975).

Right of self-defense limited. — The use of force against an officer who is attempting to detain a citizen for any legitimate purpose associated with official police duties must be limited only to defense against excessive force. *Speed v. United States*, App. D.C., 562 A.2d 124 (1989).

Belief or reason to believe complainant was a police officer. — A defendant cannot be held criminally liable on the charge of assaulting a police officer (or assaulting an officer while armed), irrespective of the force used, if the defendant did not believe, or have reason to believe, the complainant was a police officer. *Nelson v. United States*, App. D.C., 580 A.2d 114 (1990).

METRO Transit Police fall within scope of subsection (a). *McDonald v. United States*, App. D.C., 496 A.2d 274 (1985).

Assault prohibited not different from simple assault. — This section does not contemplate a level of conduct measurably different from simple assault. *Johnson v. United States*, App. D.C., 298 A.2d 516 (1972).

Where defendant fired 1 shot at 2 officers, the imposition of consecutive sentences on 2 counts, charging assaults on each of the officers with a dangerous weapon, knowing them to be members of police department, is invalid. *United States v. Lewis*, 435 F.2d 417 (D.C. Cir. 1970).

Subsequent 2nd shot deemed separate offense. — Where a defendant fired in a stairwell at 2 officers and subsequently fired a 2nd bullet from inside an apartment at a 3rd officer in the street, the shot from the stairs at the 2 officers and the shot from the apartment at the officer in the street were distinct successive criminal episodes and consecutive punishment is permissible for the count charging the assault on the 3rd officer with a dangerous weapon, knowing him to be a member of the police department. *United States v. Lewis*, 435 F.2d 417 (D.C. Cir. 1970).

The trial court did not err in imposing consecutive sentences for separate assaults on 2 groups of police officers, 1 group of which was initially at the scene and the other group of which arrived just before the shooting began. *Fletcher v. United States*, App. D.C., 335 A.2d 248 (1975).

Subsection (a) lesser included offense of subsection (b). — An assault on a correctional officer is a lesser included offense of assault on a correctional officer while armed, so that a conviction for the former cannot stand in the face of a conviction of the latter. *Smith v. United States*, App. D.C., 318 A.2d 891 (1974).

And simple assault is lesser included offense of subsection (a). *Petway v. United States*, App. D.C., 420 A.2d 1211 (1980); *McDonald v. United States*, App. D.C., 496 A.2d 274 (1985).

Assault during arrest separate from determination of original offense. — A defendant's acquittal of driving with a suspended permit and running a stop sign does not establish that there was no probable cause for an arrest for driving an automobile without a permit, and prosecution for an assault on a police officer at the time of the arrest does not place the defendant twice in jeopardy for the same offense. *United States v. Spencer*, 448 F.2d 1093 (D.C. Cir. 1971).

Where disorderly conduct and assault on police officer do not merge. — There is no double jeopardy when a defendant, after having been convicted of disorderly conduct, is prosecuted for assaulting a police officer, notwithstanding the fact that both incidents occurred in a relatively short span of time and at the same place. *Harris v. United States*, 402 F.2d 205 (D.C. Cir. 1968).

Illegality of arrest is no defense and thus is irrelevant to the charge of assaulting a police officer. *Lassiter v. District of Columbia*, App. D.C., 447 A.2d 456 (1982).

Resisting arrest. — When resisting arrest involves force used on a police officer, that offense too could be a lesser included offense of assault on a police officer and chargeable as a simple assault. *United States v. Daramola*, 119 WLR 1009 (Super. Ct. 1991).

Police officer may use force to effect even an unlawful arrest. — The legislature has explicitly recognized that an officer or member of a police force operating in the District of Columbia may use force, e.g., engage in an assault, to effect even an unlawful arrest, in circumstances where such conduct by one not an officer or member of such a police force obviously would constitute a criminal assault. *United States v. Holt*, 120 WLR 621 (Super. Ct. 1992).

Superior Court has jurisdiction of prosecution for assault on police officer in the District, even if that Court has no jurisdiction over the prosecution for an assault on a supervisor of a confined juvenile on the ground that it is an extra-territorial offense. *United States v. Thompson*, App. D.C., 347 A.2d 581 (1975).

Section 11-923(b)(1) vests jurisdiction in Superior Court to try assaults on correctional officers charged under subsection (a) of

this section when the assault was committed within the geographical boundaries of the District of Columbia. *Jackson v. United States*, App. D.C., 441 A.2d 1000 (1982).

Sentencing of juvenile under Federal Youth Corrections Act. — The conviction of a juvenile of first degree felony murder, armed robbery, assault with a dangerous weapon, assault upon a police officer with dangerous weapon and carrying a dangerous weapon should be remanded to the District Court to consider the possibility of sentencing under the former Federal Youth Corrections Act (18 U.S.C. § 5005 et seq., repealed by Pub. L. 98-473, 98 Stat. 2027, effective October 12, 1984). *United States v. Howard*, 449 F.2d 1086 (D.C. Cir. 1971).

Prerequisite to admissibility of prior acts of violence. — Knowledge of the policeman's reputation at the time of the confrontation is a prerequisite to admissibility of prior acts of violence when a claim of self-defense is asserted. In re *M.W.G.*, App. D.C., 427 A.2d 440 (1981).

Evidence sufficient to prove defendant should have been aware he was confronting police. — Evidence that defendant had an opportunity to clearly view the officer's gun and police clothing is sufficient to prove that defendant should have been aware he was confronting a policeman. In re *M.W.G.*, App. D.C., 427 A.2d 440 (1981).

Punishment for repeat offender. — The repeat offender who is convicted under subsection (b) of this section is subject to even more severe punishment because of the continuing threat he represents. *Lagon v. United States*, App. D.C., 442 A.2d 166 (1982).

In denying defendant's motion to have arrest record sealed, judge was not plainly wrong in concluding from the conflicting testimony that defendant failed to establish by clear and convincing evidence that he did not assault the police officer even though criminal proceeding was dismissed and defendant was successful in a suit for malicious prosecution. *Earle v. District of Columbia*, App. D.C., 479 A.2d 877 (1984).

Individual convicted of criminal assault under this section is not collaterally estopped from asserting liability in civil action for use of excessive force by police officer arising out of same incident. *District of Columbia v. Peters*, App. D.C., 527 A.2d 1269 (1987).

Evidence sustained conviction for assaulting and interfering with officer of metropolitan police department engaged in performance of his official duties. *Lawson v. United States*, 301 F.2d 520 (D.C. Cir. 1962); *Lee v. United States*, 344 F.2d 566 (D.C. Cir. 1965); *United States v. Spencer*, 448 F.2d 1093 (D.C. Cir. 1971).

Evidence sufficient for conviction of assault upon officer with dangerous weapon.

— See *Jones v. United States*, App. D.C., 386 A.2d 308 (1978), cert. denied, 444 U.S. 925, 100 S. Ct. 263, 62 L. Ed. 2d 181 (1979).

Instructions as to self-defense. — When an individual is approached by a police officer acting in an official capacity, the individual's right of self-defense is limited, and a jury charged with deciding whether the individual's assault upon the officer is justified must be so instructed. *Speed v. United States*, App. D.C., 562 A.2d 124 (1989).

If the court grants the government's request for instructions stating that the defendant has only a limited right of self-defense because of the status and role of the victim (i.e., a police officer carrying out official duties), the court must also instruct the jury on all the elements which require this limiting of that defense. *Speed v. United States*, App. D.C., 562 A.2d 124 (1989).

It is necessary for the trial court, whenever it is called upon to instruct a jury on self-defense in a simple assault case where the complainant is a police officer, to explicitly state to the jury that it is the government's burden to disprove, beyond a reasonable doubt, a claim of self-defense or justification raised by the defendant. *Speed v. United States*, App. D.C., 562 A.2d 124 (1989).

Because the charge was limited to assault on a police officer while armed, without a lesser included simple assault charge, and defendant did not claim that the police officers used excessive force, he had no basis for receiving a requested self-defense instruction. *Nelson v. United States*, App. D.C., 580 A.2d 114 (1990).

Instruction regarding right to use reasonable force in defense of third person. — In a prosecution under subsection (a), the trial judge committed reversible error in refusing to instruct the jury with respect to the circumstances under which an individual has the right to use reasonable force in defense of a third person. *Jones v. United States*, App. D.C., 555 A.2d 1024 (1989).

Other jury instructions. — Errors in the instructions did not prejudice appellant in any manner; in fact, appellant was afforded a greater right of self-defense than that to which he was entitled under the law where he was ultimately acquitted of the charge of assault on a police officer (APO), and, as to the lesser included offense of simple assault, the jury was instructed that the government had to prove an additional element that was not required to sustain a conviction for simple assault, that is, that appellant knew the person assaulted was a police officer engaged in official police duties. Consequently, appellant's chance for acquittal was enhanced by the instruction that the jury should acquit appellant of both APO and simple

assault if it found that appellant did not know that the complainant was a police officer. *Robinson v. United States*, App. D.C., 649 A.2d 584 (1994).

Cited in *Abrams v. United States*, 237 F.2d 42 (D.C. Cir. 1956), cert. denied, 352 U.S. 1018, 77 S. Ct. 575, 1 L. Ed. 2d 554 (1957); *Tolliver v. United States*, 273 F.2d 523 (D.C. Cir. 1959); *Nixon v. United States*, 309 F.2d 316 (D.C. Cir. 1962), cert. denied, 385 U.S. 963, 87 S. Ct. 405, 17 L. Ed. 2d 307 (1966); *Dancy v. United States*, 361 F.2d 75 (D.C. Cir. 1965); *United States v. Kennedy*, App. D.C., 220 A.2d 322 (1966); *United States v. White*, 427 F.2d 634 (D.C. Cir. 1970); *United States v. Wilson*, 434 F.2d 494 (D.C. Cir. 1970); *Wade v. United States*, 441 F.2d 1046 (D.C. Cir. 1971); *Brown v. United States*, App. D.C., 274 A.2d 683 (1971); *United States v. Raymond*, 337 F. Supp. 641 (D.D.C. 1972), aff'd sub nom. *United States v. Addison*, 498 F.2d 741 (D.C. Cir. 1974); *Terrell v. United States*, App. D.C., 294 A.2d 860 (1972), cert. denied, 410 U.S. 938, 93 S. Ct. 1398, 35 L. Ed. 2d 603 (1973); *Mack v. United States*, App. D.C., 310 A.2d 234 (1973); *United States v. Lee*, 509 F.2d 400 (D.C. Cir. 1974), cert. denied, 420 U.S. 1006, 95 S. Ct. 1451, 43 L. Ed. 2d 765 (1975); *United States v. Rosenbloom*, 511 F.2d 777 (D.C. Cir. 1974); *Smith v. United States*, App. D.C., 318 A.2d 891 (1974); *Johnson v. United States*, App. D.C., 336 A.2d 545 (1975), cert. denied, 423 U.S. 1058, 96 S. Ct. 793, 46 L. Ed. 2d 648 (1976); *Holt v. United States*, App. D.C., 340 A.2d 827 (1975); *White v. United States*, App. D.C., 358 A.2d 645 (1976); *Day v. United States*, App. D.C., 360 A.2d 483 (1976); *In re A.S.W.*, App. D.C., 391 A.2d 1385 (1978); *Scott v. United States*, App. D.C., 392 A.2d 4 (1978); *Oesby v. United States*, App. D.C., 398 A.2d 1 (1979); *Middleton v. United States*, App. D.C., 401 A.2d 109 (1979); *Butler v. United States*, App. D.C., 414 A.2d 844 (1980); *Pegues v. United States*, App. D.C., 415 A.2d 1374 (1980); *Jones v. Jackson*, App. D.C., 416 A.2d 249 (1980); *United States v. Schiller*, App. D.C., 424 A.2d 51 (1980), cert. denied, 451 U.S. 964, 101 S. Ct. 2035, 68 L. Ed. 2d 34 (1981); *Winestock v. United States*, App. D.C., 429 A.2d 519 (1981); *In re Thompson*, App. D.C., 454 A.2d 1324 (1982); *District of Columbia v. Colston*, App. D.C., 468 A.2d 954 (1983); *Robinson v. United States*, App. D.C., 506 A.2d 572 (1986); *Carter v. United States*, App. D.C., 531 A.2d 956 (1987); *Sanders v. United States*, App. D.C., 550 A.2d 343 (1988); *Reed v. United States*, App. D.C., 584 A.2d 585 (1990); *Bruce v. United States*, App. D.C., 617 A.2d 986 (1992), cert. denied, — U.S. —, 113 S. Ct. 1878, 123 L. Ed. 2d 496 (1993); *Etheredge v. District of Columbia*, 120 WLR 2225 (Super. Ct. 1992); *Parks v. United States*, App. D.C., 627 A.2d 1 (1993); *Ransom v. United States*, App. D.C., 630 A.2d 170 (1993).

§ 22-506. Mayhem or maliciously disfiguring.

Every person convicted of mayhem or of maliciously disfiguring another shall be imprisoned for not more than 10 years. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 807; 1973 Ed., § 22-506.)

Cross references. — As to additional penalty for possession of firearm, see § 22-3202.

“Maliciously disfiguring” incorporates requirements of malice and specific intent. — The language “maliciously disfiguring” is a legal term of art, adopted from the common law, which accordingly incorporates by reference the requirements of malice and specific intent. *Perkins v. United States*, App. D.C., 446 A.2d 19 (1982).

There is no evidence from the language of the statute or the legislative history that the drafters intended to change or delete the common law requirements of malice and specific intent when they drafted this section. *Perkins v. United States*, App. D.C., 446 A.2d 19 (1982).

Modern view of mayhem relates to preservation of normal functioning of human body. *Smith v. United States*, App. D.C., 466 A.2d 429 (1983).

Elements of mayhem. — The elements of mayhem are: (1) that the defendant caused permanent disabling injury to another; (2) that he had the general intent to do the injurious act; and (3) that he did so willfully and maliciously. *Edwards v. United States*, App. D.C., 583 A.2d 661 (1990).

Crime of malicious disfigurement requires proof of specific intent and an instruction which omits this element of the offense is erroneous. *Perkins v. United States*, App. D.C., 446 A.2d 19 (1982).

Specific intent requirement of malicious disfigurement serves to separate the less serious, though criminal, act which results in a permanent injury from the calculated and truly heinous act of mayhem. *Perkins v. United States*, App. D.C., 446 A.2d 19 (1982).

Elements of malicious disfigurement. — The elements of malicious disfigurement are: (1) that the defendant inflicted an injury on another; (2) that the victim was permanently disfigured; (3) that the defendant specifically intended to disfigure the victim; and (4) that the defendant was acting with malice. *Edwards v. United States*, App. D.C., 583 A.2d 661 (1990).

Injuries meeting mayhem “permanent disabling” element. — Where there was evidence that all of the surviving victims suffered permanent scarring and second and third degree burns and where the evidence established that each of them suffered burns that permanently damaged their organ system, the jury could reasonably find that the burns which

each of them suffered rendered an organ of the body either wholly useless or left its usefulness greatly impaired. *Peoples v. United States*, App. D.C., 640 A.2d 1047 (1994).

Evidence was sufficient to establish the “permanent injury” element necessary to sustain a mayhem conviction. *McKinnon v. United States*, App. D.C., 644 A.2d 438, cert. denied, — U.S. —, 115 S. Ct. 523, 130 L. Ed. 2d 428 (1994).

So long as an act of mayhem is done maliciously and willfully, a specific intent is not necessary to constitute the crime, since the common law definition, which is applicable, does not include a specific intention. *Brown v. United States*, 171 F.2d 832 (D.C. Cir. 1948).

If an assault is so malicious and wilful as to result in the loss of an eye, leg, or arm, it is immaterial to the gravity of the offense of mayhem that the assailant had no specific intention of depriving his victim of the eye, leg, or arm. *Brown v. United States*, 171 F.2d 832 (D.C. Cir. 1948).

The act of mayhem is so egregious that sufficient intent may be inferred from malicious and wilful commission of the act. *Perkins v. United States*, App. D.C., 446 A.2d 19 (1982).

“Maliciously disfiguring” incorporates requirements of malice and specific intent. — Trial judge did not commit plain error in not including specific intent to maim as an element of the offense. *Clark v. United States*, App. D.C., 639 A.2d 76 (1993).

Specific intent for malicious disfigurement present. — Where the evidence disclosed that appellant deliberately set fire to the victims’ home, using a flammable liquid accelerant, in the early morning hours while those inside were sleeping, it was reasonable to infer that appellant knew that the people inside the house would sustain grievous burn injuries if they escaped alive, and where appellant had previously threatened to blow up the house and everyone in it if his girlfriend ever left him, these circumstances evinced appellant’s intent sufficiently to permit the jury to find that appellant had the requisite specific intent to support his convictions of malicious disfigurement. *Peoples v. United States*, App. D.C., 640 A.2d 1047 (1994).

Specific intent to commit mayhem not necessary. — Mayhem remains a general intent crime, as it was under common law. *Clark v. United States*, App. D.C., 639 A.2d 76 (1993).

Specific intent to maim is not an element of the offense of mayhem. *Peoples v. United States*, App. D.C., 640 A.2d 1047 (1994).

This section requires permanence of injury or disfigurement in some appreciable form. *United States v. Cook*, 462 F.2d 301 (D.C. Cir. 1972); *Perkins v. United States*, App. D.C., 446 A.2d 19 (1982).

The proscription against malicious disfigurement focuses upon wilful permanent disfigurement rather than disablement. *Smith v. United States*, App. D.C., 466 A.2d 429 (1983).

But not total disfigurement. — To “disfigure” is to make less complete, perfect or beautiful in appearance or character, and disfigurement, in law as in common acceptance, may well be something less than the total and irreversible deterioration of bodily organ. *United States v. Cook*, 462 F.2d 301 (D.C. Cir. 1972).

Evidence in a prosecution on a charge of maliciously disfiguring another was sufficient to sustain the conviction of a defendant who threw lye at a victim who sustained scars and a partial loss of vision. *United States v. Cook*, 462 F.2d 301 (D.C. Cir. 1972).

Relationship between mayhem and murder statutes. — The statutory provisions dealing with murder and those dealing with mayhem are intended to protect different societal interests: The mayhem statute seeks to protect the preservation of the human body in its normal functioning and the integrity of the person from permanent injury or disfigurement, whereas the felony-murder statute purports to protect human life and permits the jury (when death results) to infer the presence of malice from the fact that mayhem was committed. *McFadden v. United States*, App. D.C., 395 A.2d 14 (1978).

Trial court did not violate the proscription against double jeopardy when it imposed two separate and concurrent sentences for assault with intent to kill victim while armed and malicious disfigurement of the victim while armed. *Wilson v. United States*, App. D.C., 528 A.2d 876 (1987).

And between § 22-501 and this section. — The elements of proof of the crimes prescribed by §§ 22-501 and 22-506 are different, and the sections are intended to protect different societal interests. *Bridgeford v. United States*, App. D.C., 411 A.2d 633 (1980).

Merger of mayhem and malicious disfigurement. — Defendant's convictions of mayhem and malicious disfigurement did not merge, because each offense contains an element which the other does not, and because the government proved mayhem which was not malicious disfigurement and malicious disfigurement which was not mayhem. *Edwards v. United States*, App. D.C., 583 A.2d 661 (1990).

Permanent injury and permanent disfigurement. — A single harm, e.g., cutting off a person's nose, may constitute both a permanent “injury” and a permanent “disfigurement.”

Edwards v. United States, App. D.C., 583 A.2d 661 (1990).

Assault is a lesser included offense of mayhem. *Moore v. United States*, App. D.C., 599 A.2d 1381 (1991).

Assault with a dangerous weapon was lesser included offense of mayhem while armed. *Wynn v. United States*, App. D.C., 538 A.2d 1139 (1988).

Assault with a dangerous weapon can be a lesser included offense for both armed assault with intent to kill and armed mayhem and where there was evidence in the record that would support assault with a dangerous weapon as a lesser included offense of armed mayhem it was reversible error for the trial court to deny the request for the instruction. *Hayward v. United States*, App. D.C., 612 A.2d 224 (1992).

Assault with dangerous weapon lesser included offense of malicious disfigurement. — Where defendant was convicted of both malicious disfigurement while armed and assault with a dangerous weapon, and conviction for disfigurement rested upon evidence that defendant actually used the dangerous weapon with which she was armed, the caustic liquid, to inflict scars of a permanent nature, evidence supporting guilty verdict on the assault with a dangerous weapon count was a component of the proof of the greater offense of disfigurement, and to permit both convictions to stand would offend the Double Jeopardy Clause. *Curtis v. United States*, App. D.C., 568 A.2d 1074 (1990), overruled on other grounds, *Byrd v. United States*, App. D.C., 598 A.2d 386 (1991).

Evidence of victim's appearance prior to injury. — The prosecution's failure to introduce evidence of a victim's appearance or physical condition prior to his injury does not constitute a failure to prove that the victim was permanently disfigured. *Foreman v. United States*, App. D.C., 506 A.2d 1124 (1986).

Evidence supporting inference of permanent disfigurement. — Where a victim continued to bear multiple scars on his face and body almost 11 months after the offensive incident, despite extensive medical treatment, a jury could reasonably infer that his disfigurement was permanent. *Foreman v. United States*, App. D.C., 506 A.2d 1124 (1986).

Evidence sufficient to sustain conviction for mayhem and malicious disfigurement. *Curtis v. United States*, App. D.C., 568 A.2d 1074 (1990), overruled on other grounds, *Byrd v. United States*, App. D.C., 598 A.2d 386 (1991).

Evidence sufficient to sustain conviction for mayhem while armed. — See *Whitaker v. United States*, App. D.C., 616 A.2d 843 (1992).

Cited in *Hughes v. United States*, App. D.C., 308 A.2d 238 (1973); *Villines v. United States*, App. D.C., 320 A.2d 313 (1974); *United States v. Snyder*, 529 F.2d 871 (D.C. Cir. 1976); *Cohoon v. United States*, App. D.C., 387 A.2d 1098 (1978); *Pettaway v. United States*, App. D.C., 390 A.2d 981 (1978); *Adair v. United States*, App. D.C., 391 A.2d 288 (1978); *Harvey v. United States*, App. D.C., 395 A.2d 92 (1978), cert. denied, 441 U.S. 936, 99 S. Ct. 2061, 60 L. Ed. 2d 665 (1979); *Merriweather v. United States*, App. D.C., 466 A.2d 853 (1983); *Washington v. United States*, App. D.C., 470 A.2d 729 (1983), cert. denied, 481 U.S. 1030, 107 S. Ct. 1957, 95 L. Ed. 2d 530 (1987); *Ruffin v. United States*,

App. D.C., 524 A.2d 685 (1987), cert. denied, 486 U.S. 1057, 108 S. Ct. 2827, 100 L. Ed. 2d 927 (1988); *United States v. Jackson*, App. D.C., 528 A.2d 1211 (1987); *United States v. Peoples*, 116 WLR 1161 (Super. Ct. 1988); *Taylor v. United States*, App. D.C., 603 A.2d 451, cert. denied, 506 U.S. 852, 113 S. Ct. 155, 121 L. Ed. 2d 105 (1992); *Harper v. United States*, App. D.C., 608 A.2d 152 (1992); *Johnson v. United States*, App. D.C., 613 A.2d 888 (1992); *Davis v. United States*, App. D.C., 629 A.2d 570 (1993); *Wilkes v. United States*, App. D.C., 631 A.2d 880 (1993), cert. denied, — U.S. —, 115 S. Ct. 143, 130 L. Ed. 2d 84 (1994).

§ 22-507. Threats to do bodily harm.

Whoever is convicted in the District of threats to do bodily harm shall be fined not more than \$500 or imprisoned not more than 6 months, or both, and, in addition thereto, or in lieu thereof, may be required to give bond to keep the peace for a period not exceeding 1 year. (July 16, 1912, 37 Stat. 193, ch. 235, § 2; June 29, 1953, 67 Stat. 98, ch. 159, § 212; Dec. 23, 1963, 77 Stat. 618, Pub. L. 88-241, § 11(b); 1973 Ed., § 22-507.)

Section references. — This section is referred to in § 6-2313.

Making of threat entails 3 stages: Utterance, transmittal and communication. *United States v. Baish*, App. D.C., 460 A.2d 38 (1983).

"Threat" defined. — A person "threatens" when she utters words which are intended to convey her desire to inflict physical or other harm on any person or on property, and these words are communicated to someone. *United States v. Baish*, App. D.C., 460 A.2d 38 (1983).

No crime committed until threat heard by someone other than speaker. — A person making threats does not commit a crime until the threat is heard by one other than the speaker. *United States v. Baish*, App. D.C., 460 A.2d 38 (1983).

This section covers oral threats, and written ones. *Tolentino v. United States*, App. D.C., 636 A.2d 433 (1994).

Uncommunicated threat, by definition, cannot threaten. *United States v. Baish*, App. D.C., 460 A.2d 38 (1983).

Threat prohibited even if conditional. — The mere fact that an infliction of harm is threatened upon a condition does not preclude it from being a "threat" within this section. *Postell v. United States*, App. D.C., 282 A.2d 551 (1971).

If fear of bodily harm induced. — To sustain a conviction for a threat to do bodily harm, it is necessary only that the threats impart an expectation of bodily harm, thereby inducing fear and apprehension in the person threatened. *Postell v. United States*, App. D.C., 282 A.2d 551 (1971).

Threat need only be in words. — The prosecution of a juvenile, who told a 13-year-old complainant that the juvenile and another would kill him or get someone else to "jump him" if he did not go through a broken window and remove certain items from a ground-floor apartment, should be had, under this section, for a threat by words conveying a menace or a fear of bodily harm. *In re D.W.J.*, App. D.C., 293 A.2d 268 (1972).

And need not be directed to threatened individual. — This section does not require that threats be communicated directly to the threatened individual. *Gurley v. United States*, App. D.C., 308 A.2d 785 (1973).

Single threat directed to more than 1 person constitutes but single offense. *Smith v. United States*, App. D.C., 295 A.2d 60 (1972).

Relationship to § 22-2307. — The evidence relied upon to prove a felony under § 22-2307 is identical to the evidence needed to show a misdemeanor under this section. *United States v. Young*, App. D.C., 376 A.2d 809 (1977).

Evidence sufficient to establish District jurisdiction over offense. — Both the utterance and the communication of the threatening language are integral components of the offense of making threats to do bodily harm and proof that either component occurred within the District establishes a basis for prosecution in the Superior Court. *United States v. Baish*, App. D.C., 460 A.2d 38 (1983).

If a threat is heard by someone within the District of Columbia, the speaker threatens

with the proscriptive ambit of this section — regardless of where she utters the threatening words. *United States v. Baish*, App. D.C., 460 A.2d 38 (1983).

Proof required to establish prima facie case. — To establish a prima facie case, the government must prove that the defendant uttered words to another, as well as that these words were of such a nature as to convey fear of serious bodily harm or injury to the ordinary hearer, and that the defendant intended to utter these words as a threat. *United States v. Baish*, App. D.C., 460 A.2d 38 (1983).

Evidence sufficient to sustain conviction for threatening to do bodily harm. — See *Gurley v. United States*, App. D.C., 308 A.2d 785 (1973).

Cited in *McDonald v. United States*, App. D.C., 183 A.2d 396 (1962); *Hines v. United States*, App. D.C., 237 A.2d 827 (1968); *Gressette v. United States*, App. D.C., 256 A.2d 418 (1969); *Wilson v. United States*, App. D.C.,

261 A.2d 513 (1970); *Davis v. United States*, App. D.C., 313 A.2d 884 (1974); *Brooks v. United States*, App. D.C., 367 A.2d 1297 (1976); *Mariam v. United States*, App. D.C., 385 A.2d 776 (1978); *Jackson v. United States*, App. D.C., 385 A.2d 786 (1978); *Woodward v. District of Columbia*, App. D.C., 387 A.2d 726 (1978); *Thomas v. United States*, App. D.C., 418 A.2d 122 (1980); *Campbell v. United States*, App. D.C., 450 A.2d 428 (1982); *James v. United States*, App. D.C., 514 A.2d 793 (1986); *Beard v. United States*, App. D.C., 535 A.2d 1373 (1988); *United States v. Koritko*, 870 F.2d 738 (D.C. Cir. 1989); *Holt v. United States*, App. D.C., 565 A.2d 970 (1989); *Belcher v. United States*, App. D.C., 572 A.2d 453 (1990); *Joiner v. United States*, App. D.C., 585 A.2d 176 (1991); *Parker v. United States*, App. D.C., 586 A.2d 720 (1991); *United States v. Bellamy*, App. D.C., 619 A.2d 515 (1993); *In re K.H.*, App. D.C., 647 A.2d 61 (1994).

§ 22-508. Penalty for assaulting, beating, or fighting on account of money won by gaming.

In case any person or persons, whatsoever, shall assault and beat, or shall challenge or provoke to fight any other person or persons, whatsoever, upon account of any money won by gaming, playing, or betting at any of the games mentioned in §§ 16-1701 to 16-1704, such person or persons assaulting and beating, or challenging or provoking to fight such other person or persons upon the account aforesaid, being thereof convicted upon an indictment or information to be exhibited against such person or persons for that purpose, shall suffer imprisonment during the term of 2 years. (9 Anne, ch. 14, § 8, 1710; *Kilty's Rept.*, p. 248; *Alex. Brit. Stat.*, p. 692; *Comp. Stat. D.C.*, p. 245, § 17; 1973 Ed., § 22-508; May 21, 1994, D.C. Law 10-119, § 4, 41 DCR 1639.)

Cross references. — As to assault and disorderly conduct, see §§ 22-501 to 22-507 and 22-1101 to 22-1120.

Effect of amendments. — D.C. Law 10-119

substituted “such person or persons” for “him or them” following “exhibited against.”

Legislative history of Law 10-119. — See note to § 22-505.

CHAPTER 6. BIGAMY.

Sec.

22-601. Definition and penalty.

§ 22-601. Definition and penalty.

Whoever, having a husband or wife living, marries another shall be deemed guilty of bigamy, and on conviction thereof shall suffer imprisonment for not less than 2 nor more than 7 years; provided, that this section shall not apply to any person whose husband or wife has been continually absent for 5 successive years next before such marriage without being known to such person to be living within that time, or whose marriage to said living husband or wife shall have been dissolved by a valid decree of a competent court, or shall have been pronounced void by a valid decree of a competent court on the ground of the nullity of the marriage contract. (Mar. 3, 1901, 31 Stat. 1331, ch. 854, § 870; 1973 Ed., § 22-601.)

Good faith effort needed to ascertain marital status. — There must be some honest and effective effort made by a defendant to ascertain the truth before it can be claimed that the conclusion of the defendant that his first

wife had obtained a divorce had been reached in good faith. *Alexander v. United States*, 136 F.2d 783 (D.C. Cir. 1943).

Cited in *Matz v. United States*, 158 F.2d 190 (D.C. Cir. 1946).

CHAPTER 7. BRIBERY; OBSTRUCTING JUSTICE; RELATED OFFENSES.

Subchapter I. Corrupt Influence.

Sec.

22-701 to 22-703. [Repealed].

22-704. Corrupt influence; officials.

Subchapter II. Bribery.

22-711. Definitions.

22-712. Prohibited acts; penalty.

Sec.

22-713. Bribery of witness; penalty.

Subchapter III. Obstructing Justice.

22-721. Definitions.

22-722. Prohibited acts; penalty.

22-723. Tampering with physical evidence; penalty.

Subchapter I. Corrupt Influence.

Editor's notes. — Because of the enactment of subchapters II and III of this chapter by D.C. Law 4-164, the preexisting text of Chapter 7, to

include §§ 22-701 through 22-704, has been designated as subchapter I of this chapter.

§§ 22-701 to 22-703. Definition and penalty; offering or receiving money, property, or valuable consideration to procure office or promotion from Council; obstructing justice.

Repealed. Dec. 1, 1982, D.C. Law 4-164, § 602(b)-(d), 29 DCR 3976.

Legislative history of Law 4-164. — Law 4-164, the "District of Columbia Theft and White Collar Crimes Act of 1982," was introduced in Council and assigned Bill No. 4-133, which was referred to the Committee on the Judiciary. The Bill was adopted on first,

amended first and second readings on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.

§ 22-704. Corrupt influence; officials.

(a) Whosoever corruptly, directly or indirectly, gives any money, or other bribe, present, reward, promise, contract, obligation, or security for the payment of any money, present, reward, or thing of value to any ministerial, administrative, executive, or judicial officer of the District of Columbia, or any employee, or other person acting in any capacity for the District of Columbia, or any agency thereof, either before or after the officer, employee, or other person acting in any capacity for the District of Columbia is qualified, with intent to influence such official's action on any matter which is then pending, or may by law come or be brought before such official in such official's official capacity, or to cause such official to execute any of the powers in such official vested, or to perform any duties of such official required, with partiality or favor, or otherwise than is required by law, or in consideration that such official being authorized in the line of such official's duty to contract for any advertising or for the furnishing of any labor or material, shall directly or indirectly arrange to receive or shall receive, or shall withhold from the parties so contracted with, any portion of the contract price, whether that price be fixed by law or by agreement, or in consideration that such official has nominated or appointed any person to any office or exercised any power in such

official vested, or performed any duty of such official required, with partiality or favor, or otherwise contrary to law; and whosoever, being such an official, shall receive any such money, bribe, present, or reward, promise, contract, obligation, or security, with intent or for the purpose or consideration aforesaid shall be deemed guilty of bribery and upon conviction thereof shall be punished by imprisonment for a term not less than 6 months nor more than 5 years.

(b) Whosoever corrupts or attempts, directly or indirectly, to corrupt any special master, auditor, juror, arbitrator, umpire, or referee, by giving, offering, or promising any gift or gratuity whatever, with intent to bias the opinion, or influence the decision of such official, in relation to any matter pending in the court, or before an inquest, or for the decision of which such arbitrator, umpire, or referee has been chosen or appointed, and every official who receives, or offers or agrees to receive, a bribe in any of the cases above mentioned shall be guilty of bribery and upon conviction thereof shall be punished as hereinbefore provided. (Feb. 26, 1936, 49 Stat. 1143, ch. 87; 1973 Ed., § 22-704; May 21, 1994, D.C. Law 10-119, § 5, 41 DCR 1639.)

Cross references. — As to bribery, see § 22-712.

Section references. — This section is referred to in § 23-546.

Effect of amendments. — D.C. Law 10-119, in (a), substituted “the officer, employee or other person acting in any capacity for the District of Columbia” for “he” and substituted “such official’s” for “his” three times; and substituted “such official” for “him” and for “such officer” throughout the section.

Legislative history of Law 10-119. — Law 10-119, the “Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on Febru-

ary 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Evidence sufficient to sustain conviction for corruptly influencing officer. — See *Wallace v. United States*, 412 F.2d 1097 (D.C. Cir. 1969), cert. denied, 402 U.S. 943, 91 S. Ct. 1605, 29 L. Ed. 2d 110 (1971).

Cited in *Monroe v. United States*, 234 F.2d 49 (D.C. Cir.), cert. denied, 352 U.S. 873, 77 S. Ct. 94, 1 L. Ed. 2d 76 (1956); *Hutcherson v. United States*, 351 F.2d 748 (D.C. Cir. 1965); *Sell v. United States*, App. D.C., 525 A.2d 1017 (1987); *Allen v. District of Columbia*, App. D.C., 533 A.2d 1259 (1987).

Subchapter II. Bribery.

§ 22-711. Definitions.

For the purposes of this subchapter, the term:

(1) “Court of the District of Columbia” means the Superior Court of the District of Columbia or the District of Columbia Court of Appeals.

(2) “Juror” means any grand, petit, or other juror, or any person selected or summoned as a prospective juror of the District of Columbia.

(3) “Official action” means any decision, opinion, recommendation, judgment, vote, or other conduct that involves an exercise of discretion on the part of the public servant.

(4) “Official duty” means any required conduct that does not involve an exercise of discretion on the part of the public servant.

(5) “Official proceeding” means any trial, hearing, investigation, or other proceeding in a court of the District of Columbia or conducted by the Council

of the District of Columbia or an agency or department of the District of Columbia government, or a grand jury proceeding.

(6) “Public servant” means any officer, employee, or other person authorized to act for or on behalf of the District of Columbia government. The term “public servant” includes any person who has been elected, nominated, or appointed to be a public servant or a juror. The term “public servant” does not include an independent contractor. (Dec. 1, 1982, D.C. Law 4-164, § 301, 29 DCR 3976; May 7, 1993, D.C. Law 9-268, § 2(a), 39 DCR 5702.)

Legislative history of Law 4-164. — See note to § 22-701.

Legislative history of Law 9-268. — Law 9-268, the “Law Enforcement Witness Protection Amendment Act of 1992,” was introduced in Council and assigned Bill No. 9-385 which was referred to the Committee on the Judiciary. The Bill was adopted on first and second read-

ings on June 2, 1992, and July 7, 1992, respectively. Signed by the Mayor on July 21, 1992, it was assigned Act No. 9-256 and transmitted to both Houses of Congress for its review. D.C. Law 9-268 became effective on May 7, 1993.

Cited in *Colbert v. United States*, App. D.C., 601 A.2d 603 (1992).

§ 22-712. Prohibited acts; penalty.

(a) A person commits the offense of bribery if that person:

(1) Corruptly offers, gives, or agrees to give anything of value, directly or indirectly, to a public servant; or

(2) Corruptly solicits, demands, accepts, or agrees to accept anything of value, directly or indirectly, as a public servant; in return for an agreement or understanding that an official act of the public servant will be influenced thereby or that the public servant will violate an official duty, or that the public servant will commit, aid in committing, or will collude in or allow any fraud against the District of Columbia.

(b) Nothing in this section shall be construed as prohibiting concurrence in official action in the course of legitimate compromise between public servants.

(c) Any person convicted of bribery shall be fined not more than \$25,000 or 3 times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than 10 years, or both. (Dec. 1, 1982, D.C. Law 4-164, § 302, 29 DCR 3976.)

Legislative history of Law 4-164. — See note to § 22-701.

For the purposes of a prosecution under this section, the Washington Metropolitan

Area Transit Authority is a District of Columbia agency. *Colbert v. United States*, App. D.C., 601 A.2d 603 (1992).

§ 22-713. Bribery of witness; penalty.

(a) A person commits the offense of bribery of a witness if that person:

(1) Corruptly offers, gives, or agrees to give to another person; or

(2) Corruptly solicits, demands, accepts, or agrees to accept from another person;

anything of value in return for an agreement or understanding that the testimony of the recipient will be influenced in an official proceeding before any court of the District of Columbia or any agency or department of the District of

Columbia government, or that the recipient will absent himself or herself from such proceedings.

(b) Nothing in subsection (a) of this section shall be construed to prohibit the payment or receipt of witness fees provided by law, or the payment by the party upon whose behalf a witness is called and receipt by a witness of a reasonable cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such proceeding, or, in case of expert witnesses, a reasonable fee for time spent in the preparation of a technical or professional opinion and appearing and testifying.

(c) Any person convicted of bribery of a witness shall be fined not more than \$2,500 or imprisoned for not more than 5 years, or both. (Dec. 1, 1982, D.C. Law 4-164, § 303, 29 DCR 3976.)

Cross references. — As to obstruction of justice, see § 22-722.

Legislative history of Law 4-164. — See note to § 22-701.

Cited in *Hazel v. United States*, App. D.C., 599 A.2d 38 (1991), cert. denied, 506 U.S. 939, 113 S. Ct. 374, 121 L. Ed. 2d 286 (1992).

Subchapter III. Obstructing Justice.

§ 22-721. Definitions.

For the purpose of this subchapter, the term:

(1) “Court of the District of Columbia” means the Superior Court of the District of Columbia or the District of Columbia Court of Appeals.

(2) “Criminal investigator” means an individual authorized by the Mayor or the Mayor’s designated agent to conduct or engage in a criminal investigation, or a prosecuting attorney conducting or engaged in a criminal investigation.

(3) “Criminal investigation” means an investigation of a violation of any criminal statute in effect in the District of Columbia.

(4) “Official proceeding” means any trial, hearing, investigation, or other proceeding in a court of the District of Columbia or conducted by the Council of the District of Columbia or an agency or department of the District of Columbia government, or a grand jury proceeding. (Dec. 1, 1982, D.C. Law 4-164, § 501, 29 DCR 3976; May 7, 1993, D.C. Law 9-268, § 2(b), 39 DCR 5702.)

Legislative history of Law 4-164. — See note to § 22-701.

Legislative history of Law 9-268. — See note to § 22-711.

§ 22-722. Prohibited acts; penalty.

(a) A person commits the offense of obstruction of justice if that person:

(1) Knowingly uses intimidation or physical force, threatens or corruptly persuades another person, or by threatening letter or communication, endeavors to influence, intimidate, or impede a juror in the discharge of the juror’s official duties;

(2) Knowingly uses intimidating or physical force, threatens or corruptly persuades another person, or by threatening letter or communication, endeavor-

ors to influence, intimidate, or impede a witness or officer in any official proceeding, with intent to:

(A) Influence, delay, or prevent the truthful testimony of the person in an official proceeding;

(B) Cause or induce the person to withhold truthful testimony or a record, document, or other object from an official proceeding;

(C) Evade a legal process that summons the person to appear as a witness or produce a document in an official proceeding; or

(D) Cause or induce the person to be absent from a legal official proceeding to which the person has been summoned by legal process;

(3) Harasses another person with the intent to hinder, delay, prevent, or dissuade the person from:

(A) Attending or testifying truthfully in an official proceeding;

(B) Reporting to a law enforcement officer the commission of, or any information concerning, a criminal offense;

(C) Arresting or seeking the arrest of another person in connection with the commission of a criminal offense; or

(D) Causing a criminal prosecution or a parole or probation revocation proceeding to be sought or instituted, or assisting in a prosecution or other official proceeding;

(4) Injures any person or his or her property on account of the person or any other person giving to a criminal investigator in the course of any criminal investigation information related to a violation of any criminal statute in effect in the District of Columbia;

(5) Injures any person or his or her property on account of the person or any other person performing his official duty as a juror, witness, or officer in any court in the District of Columbia; or

(6) Corruptly, or by threats of force, any way obstructs or impedes or endeavors to obstruct or impede the due administration of justice in any official proceeding.

(b) Any person convicted of obstruction of justice shall be sentenced to a maximum period of incarceration of not less than 3 years and not more than life, or shall be fined not more than \$10,000, or both. (Dec. 1, 1982, D.C. Law 4-164, § 502, 29 DCR 3976; May 7, 1993, D.C. Law 9-268, § 2(c), 39 DCR 5702; May 23, 1995, D.C. Law 10-256, § 3, 42 DCR 20.)

Cross references. — As to bribery of witness, see § 22-713.

Section references. — This section is referred to in § 23-1322.

Effect of amendments. — D.C. Law 10-256 added (a)(6) and rewrote (b).

Legislative history of Law 4-164. — See note to § 22-701.

Legislative history of Law 9-268. — See note to § 22-711.

Legislative history of Law 10-256. — Law 10-256, the “Public Safety and Law Enforcement Support Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-628, which was referred to the Committee

on the Judiciary. The Bill was adopted on first and second readings on November 1, 1994, and December 6, 1994, respectively. Signed by the Mayor on December 28, 1994, it was assigned Act No. 10-375 and transmitted to both Houses of Congress for its review. D.C. Law 10-256 became effective May 23, 1995.

Purpose of former § 22-703. — Former § 22-703 was intended to insulate the criminal justice system from corruption. *Ball v. United States*, App. D.C., 429 A.2d 1353 (1981).

Elements of the crime. — Contention that threatening acts were to impede grand jury rejected where there was no mention of grand jury nor even that defendants had knowledge

that witness was to testify before grand jury and all evidence indicated threats were an attempt to impede the police investigation. *Payne v. United States*, App. D.C., 516 A.2d 484 (1986).

Congress did not intend that § 22-2307 and former § 22-703 be greater and lesser included offenses of each other, or otherwise the same offense within the meaning of double jeopardy analysis. *Ball v. United States*, App. D.C., 429 A.2d 1353 (1981).

The offenses proscribed by § 22-2307 and former § 22-703 lack the inherent relationship required to apply the doctrines of merger and lesser included offenses. *Ball v. United States*, App. D.C., 429 A.2d 1353 (1981).

Indictment was not fatally defective because defendant was charged under obstruction of justice statute repealed 3 weeks prior to alleged commission of act, where the indictment incorrectly cited § 22-703 (repealed December 1, 1982), which was replaced with this section, which proscribes not only the same, but a broader range of conduct. *Scutchings v. United States*, App. D.C., 509 A.2d 634 (1986).

Construed with § 22-2512. — Section 22-2512 deals with a wide variety of statements under oath, and covers a multitude of instances which would not be reached by paragraph (a)(1), and this section likewise covers far more than attempts to seek false testimony. *Smith v. United States*, App. D.C., 591 A.2d 229 (1991).

"Witness." — Where a person had accompanied defendant to the general area of the killing, he clearly had knowledge of relevant facts immediately surrounding the offense, and could be expected to testify concerning them and was properly found to be within the definition of a witness under this section. *Smith v. United States*, App. D.C., 591 A.2d 229 (1991).

Certainty as to one's role as a witness is not the test; it is whether there is a reasonable expectation to that effect. *Smith v. United States*, App. D.C., 591 A.2d 229 (1991).

If, by his actions, a defendant attempts to vest a person with the status of one who "may know" or "is supposed to know", for it is not actual knowledge that is required, then that person indeed becomes a witness within the meaning of this section. *Smith v. United States*, App. D.C., 591 A.2d 229 (1991).

No merger with subornation of perjury. — Because subornation of perjury and obstruction of justice each require proof of an element the other does not, the offenses do not merge, and the trial court is free to impose separate sentences for each. *Riley v. United States*, App. D.C., 647 A.2d 1165 (1994).

Failure to sever armed robbery and obstruction of justice counts held proper. — See *Byrd v. United States*, App. D.C., 502 A.2d 451 (1985).

Jurisdiction of Superior Court. — Superior Court has jurisdiction over prosecutions for conduct in Maryland designed to obstruct the administration of justice in the courts of the District of Columbia. *Ford v. United States*, App. D.C., 616 A.2d 1245 (1992).

Former § 22-703 cited in *Green v. United States*, App. D.C., 446 A.2d 402 (1982); *United States v. Anderson*, App. D.C., 450 A.2d 446 (1982).

Cited in *Abrams v. United States*, App. D.C., 531 A.2d 964 (1987); *Beard v. United States*, App. D.C., 535 A.2d 1373 (1988); *Johnson v. United States*, App. D.C., 544 A.2d 270 (1988); *Holmes v. United States*, App. D.C., 580 A.2d 1259 (1990); *Caldwell v. United States*, App. D.C., 595 A.2d 961 (1991); *Hazel v. United States*, App. D.C., 599 A.2d 38 (1991), cert. denied, 506 U.S. 939, 113 S. Ct. 374, 121 L. Ed. 2d 286 (1992); *McClain v. United States*, App. D.C., 601 A.2d 80 (1992); *Swanson v. United States*, App. D.C., 602 A.2d 1102 (1992); *Hayward v. United States*, App. D.C., 612 A.2d 224 (1992); *Skyers v. United States*, App. D.C., 619 A.2d 931 (1993); *Lee v. United States*, App. D.C., 668 A.2d 822 (1995).

§ 22-723. Tampering with physical evidence; penalty.

(a) A person commits the offense of tampering with physical evidence if, knowing or having reason to believe an official proceeding has begun or knowing that an official proceeding is likely to be instituted, that person alters, destroys, mutilates, conceals, or removes a record, document, or other object, with intent to impair its integrity or its availability for use in the official proceeding.

(b) Any person convicted of tampering with physical evidence shall be fined not more than \$1,000 or imprisoned for not more than 3 years, or both. (Dec. 1, 1982, D.C. Law 4-164, § 503, 29 DCR 3976.)

Legislative history of Law 4-164. — See 1380 (D.D.C. 1990); Roundtree v. United States, App. D.C., 581 A.2d 315 (1990).
note to § 22-701.

Cited in United States v. Smith, 729 F. Supp.

CHAPTER 8. CRUELTY TO ANIMALS.

Sec.	Sec.
22-801. Definition and penalty.	baiting of fowls or animals; arrest without warrant.
22-802. Other cruelties to animals.	
22-803. Rest, water and feeding for animals transported by railroad company.	22-810. Penalty for engaging in cockfighting or animal fighting.
22-804. Arrests without warrant authorized; notice to owner.	22-811. Neglect of sick or disabled animals.
22-805. Issuance of search warrants.	22-812. Abandonment of maimed or diseased animal; destruction of diseased animals; disposition of animal or vehicle on arrest of driver; scientific experiments.
22-806. Prosecution of offenders; disposition of fines.	
22-807. Impounded animals to be supplied with food and water.	22-813. Definitions.
22-808. Relief of impounded animals.	22-814. Docking tails of horses.
22-809. Keeping or using place for fighting or	

§ 22-801. Definition and penalty.

Whoever overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, cruelly beats, mutilates, or cruelly kills, or causes or procures to be so overdriven, overloaded, driven when overloaded, overworked, tortured, tormented, deprived of necessary sustenance, cruelly beaten, mutilated, or cruelly killed any animal, and whoever, having the charge or custody of any animal, either as owner or otherwise, inflicts unnecessary cruelty upon the same, or unnecessarily fails to provide the same with proper food, drink, shelter, or protection from the weather, shall for every such offense be punished by imprisonment in jail not exceeding 180 days, or by fine not exceeding \$250, or by both such fine and imprisonment. (Aug. 23, 1871, Leg. Assem., p. 135, ch. 106, § 1; 1973 Ed., § 22-801; Aug. 20, 1994, D.C. Law 10-151, § 102(a), 41 DCR 2608.)

Section references. — This section is referred to in §§ 6-1023, 22-802, 22-806, 22-807, 22-809 and 22-811 to 22-813.

Effect of amendments. — D.C. Law 10-151 substituted “180 days” for “1 year.”

Emergency act amendments. — For temporary amendment of section, see § 102(a) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — Law 10-151, the “Omnibus Criminal Justice Reform Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

Section is not unconstitutionally overbroad. — Appellant’s argument that this section is unconstitutionally overbroad is frivolous since an overbroad statute is one that reaches a

substantial amount of constitutionally protected conduct and appellant has not suggested any sort of constitutionally protected right to associate with animals — or any other constitutional right — that may be chilled by enforcement of this section. *Tuck v. United States*, App. D.C., 467 A.2d 727 (1983).

Section not unconstitutionally vague. — The words “unnecessarily” and “proper” are not so indefinite as to render unconstitutionally vague the provision of this section calling for punishment of anyone who “unnecessarily fails to provide” an animal in one’s custody “with proper food, drink, shelter, or protection from the weather.” *Tuck v. United States*, App. D.C., 467 A.2d 727 (1983).

This section’s application to appellant was not so vague as to violate due process, given extensive testimony that puppies in appellant’s custody were suffering from dehydration and malnutrition, that they were being kept in cages without water, that they were weakened to the point where many were unable to stand up, and that they were desperate in their eagerness for the food placed before them. *Tuck v. United States*, App. D.C., 467 A.2d 727 (1983).

Section does not require specific intent.

— This section does not require proof of specific intent to injure or abuse. The specific intent requirement would offer the animal owner the greatest protection, but the general intent with malice requirement reflects the growing concern in the law for the protection of animals, while at the same time acknowledging that humans have a great deal of discretion with respect to the treatment of their animals. *Regalado v. United States*, App. D.C., 572 A.2d 416 (1990).

Defendant given adequate notice of charge. — Defendant, convicted of a misdemeanor, did not lack notice of charge against her nor face further prosecution in violation of double jeopardy clause, where the information that was checked in her case related solely to offense A (the first clause of the section) but prosecutor proceeded and convicted the defendant under offense B (the second clause of the section) because (1) there was no significant

difference that could have affected the jury's verdict and (2) the facts necessary to prove either offense are the same. *Carr v. United States*, App. D.C., 585 A.2d 158 (1991).

Finding of unnecessary cruelty not necessary. — A defendant can be convicted of unnecessarily failing to provide a dog with proper food, drink, shelter, or protection from weather without a finding that he inflicted unnecessary cruelty upon the dog. *Jordan v. United States*, App. D.C., 269 A.2d 848 (1970).

Exigent circumstances justified warrantless seizure of animal living under cruel conditions, and trial court properly denied motion to suppress testimony resulting from the warrantless seizure of an animal. *Tuck v. United States*, App. D.C., 477 A.2d 1115 (1984).

Evidence. — Evidence was sufficient to sustain conviction. *Regalado v. United States*, App. D.C., 572 A.2d 416 (1990).

Cited in *Settles v. United States*, App. D.C., 615 A.2d 1105 (1992).

§ 22-802. Other cruelties to animals.

Every owner, possessor, or person having the charge or custody of any animal, who cruelly drives or works the same when unfit for labor, or cruelly abandons the same, or who carries the same, or causes the same to be carried, in or upon any vehicle, or otherwise, in an unnecessarily cruel or inhuman manner, or knowingly and wilfully authorizes or permits the same to be subjected to unnecessary torture, suffering, or cruelty of any kind, shall be punished for every such offense in the manner provided in § 22-801. (Aug. 23, 1871, Leg. Assem., p. 135, ch. 106, § 2; 1973 Ed., § 22-802.)

Section references. — This section is referred to in §§ 22-806, 22-812 and 22-813.

§ 22-803. Rest, water and feeding for animals transported by railroad company.

No railroad company, in the carrying or transportation of animals, shall permit the same to be confined in cars for a longer period than 24 hours, without unloading the same, for rest, water, and feeding, for a period of at least 5 consecutive hours, unless prevented from so unloading by storm or other accidental causes. In estimating such confinement the time during which such animals have been confined without such rest on connecting roads from which they are received shall be included; it being the intent of this section to prohibit their continuous confinement beyond the period of 24 hours, except upon contingencies hereinbefore stated. Animals so unloaded shall be properly fed, watered, and sheltered during such rest by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad company transporting the same, at the expense of said owner or persons in custody thereof. And said company shall, in such case, have a lien upon such animals for food, care, and custody furnished, and shall not be liable for any

detention of such animals authorized by this section. Any company, owner, or custodian of such animals who fails to comply with the provisions of this section shall, for each and every such offense, be liable for and forfeit and pay a penalty of not less than \$ 1 nor more than \$ 500; provided, however, that when animals shall be carried in cars in which they can and do have proper food, water, space, and opportunity for rest, the foregoing provisions in regard to their being unloaded shall not apply. (Aug. 23, 1871, Leg. Assem., p. 135, ch. 106, § 3; 1973 Ed., § 22-803.)

Section references. — This section is referred to in §§ 22-806, 22-812 and 22-813.

§ 22-804. Arrests without warrant authorized; notice to owner.

Any person found violating the laws in relation to cruelty to animals may be arrested and held without a warrant, in the manner provided by § 32-905 and the person making an arrest, with or without a warrant, shall use reasonable diligence to give notice thereof to the owner of animals found in the charge or custody of the person arrested, and shall properly care and provide for such animals until the owner thereof shall take charge of the same; provided, the owner shall take charge of the same within 20 days from the date of said notice. And the person making such arrest shall have a lien on said animals for the expense of such care and provisions. (Aug. 23, 1871, Leg. Assem., p. 136, ch. 106, § 4; 1973 Ed., § 22-804.)

Cross references. — As to arrests without warrants, see § 23-581.

Section references. — This section is referred to in §§ 22-806, 22-812 and 22-813.

§ 22-805. Issuance of search warrants.

When complaint is made by any member of the Washington Humane Society on oath or affirmation, to any magistrate authorized to issue warrants in criminal cases, that the complainant believes, and has reasonable cause to believe, that the laws in relation to cruelty to animals have been or are being violated in any particular building or place, such magistrate, if satisfied that there is reasonable cause for such belief, shall issue a search warrant, authorizing any marshal, deputy marshal, police officer, or any member of the Washington Humane Society to search such building or place. (Aug. 23, 1871, Leg. Assem., p. 136, ch. 106, § 5; Feb. 13, 1885, 23 Stat. 302, ch. 58, § 1; Mar. 3, 1901, 31 Stat. 1195, ch. 854, § 41; 1973 Ed., § 22-805.)

Cross references. — As to search warrants, see §§ 23-521 to 23-525.

Cited in Tuck v. United States, App. D.C., 467 A.2d 727 (1983).

Section references. — This section is referred to in §§ 22-806, 22-812 and 22-813.

§ 22-806. Prosecution of offenders; disposition of fines.

It shall be the duty of all marshals, deputy marshals, police officers, or any member of the Washington Humane Society, to prosecute all violations of the provisions of §§ 22-801 to 22-809 and §§ 22-811, 22-813, and 22-814, which shall come to their notice or knowledge, and fines and forfeitures collected upon or resulting from the complaint or information of any member of the Washington Humane Society under §§ 22-801 to 22-809 and §§ 22-811, 22-813, and 22-814 shall inure and be paid over to said association, in aid of the benevolent objects for which it was incorporated. (Aug. 23, 1871, Leg. Assem., p. 137, ch. 106, § 6; Feb. 13, 1885, 23 Stat. 302, ch. 58, § 1; Mar. 3, 1901, 31 Stat. 1195, ch. 854, § 41; 1973 Ed., § 22-806.)

Section references. — This section is referred to in §§ 22-812 and 22-813.

§ 22-807. Impounded animals to be supplied with food and water.

Any person who shall impound, or cause to be impounded in any pound, any creature, shall supply the same, during such confinement, with a sufficient quantity of good and wholesome food and water; and in default thereof shall, upon conviction, be punished for every such offense in the same manner provided in § 22-801. (Aug. 23, 1871, Leg. Assem., p. 137, ch. 106, § 7; 1973 Ed., § 22-807.)

Section references. — This section is referred to in §§ 22-806, 22-812 and 22-813.

§ 22-808. Relief of impounded animals.

In case any creature shall be at any time impounded as aforesaid, and shall continue to be without necessary food and water for more than 12 successive hours, it shall be lawful for any officer of the Washington Humane Society, from time to time, and as often as it shall be necessary, to enter into and upon any pound in which such creature shall be so confined, and supply it with necessary food and water so long as it shall remain so confined; such person shall not be liable to any action for such entry, and the reasonable cost for such food and water may be collected of the owner of such creature, and the said creature shall not be exempt from levy and sale upon execution issued upon a judgment thereof. (Aug. 23, 1871, Leg. Assem., p. 137, ch. 106, § 8; Feb. 13, 1885, 23 Stat. 302, ch. 58, § 1; 1973 Ed., § 22-808.)

Section references. — This section is referred to in §§ 22-806, 22-812 and 22-813.

§ 22-809. Keeping or using place for fighting or baiting of fowls or animals; arrest without warrant.

Any person or persons who shall keep or use, or in any way be connected with or interested in the management of, or shall receive money for the admission of any person to any place kept or used for the purpose of fighting or baiting of fowls or animals, may be arrested without a warrant, as provided in § 32-905, and for every such offense be punished in the same manner provided in § 22-801. (Aug. 23, 1871, Leg. Assem., p. 137, ch. 106, § 9; 1973 Ed., § 22-809.)

Section references. — This section is referred to in §§ 22-806, 22-812 and 22-813.

§ 22-810. Penalty for engaging in cockfighting or animal fighting.

Any person who sets on foot, instigates, promotes, carries on, or does any act, as assistant, umpire, or principal, or attends or in any way engages in the furtherance of any fight between cocks, fowls, or other birds, or dogs, bulls, bears, or other animals, premeditated by any persons owning or having custody of such birds or animals, is guilty of a misdemeanor, punishable by a fine of not more than \$1,000 or by imprisonment in jail not more than 180 days, or both. (June 25, 1892, 27 Stat. 61, ch. 135, § 6; 1973 Ed., § 22-810; Oct. 18, 1988, D.C. Law 7-176, § 7(d), 35 DCR 4787; Aug. 20, 1994, D.C. Law 10-151, § 103, 41 DCR 2608.)

Effect of amendments. — D.C. Law 10-151 substituted "\$1,000" for "\$10,000"; and substituted "180 days" for "1 year."

Emergency act amendments. — For temporary amendment of section, see § 103 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 7-176. — Law 7-176, the "Dangerous Dog Amendment Act of

1988," was introduced in Council and assigned Bill No. 7-276, which was referred to the Committee on Human Services. The Bill was adopted on first and second readings on May 17, 1988 and May 31, 1988, respectively. Signed by the Mayor on June 9, 1988, it was assigned Act No. 7-190 and transmitted to both Houses of Congress for its review.

Legislative history of Law 10-151. — See note to § 22-801.

§ 22-811. Neglect of sick or disabled animals.

If any maimed, sick, infirm, or disabled animal shall fail to receive proper food or shelter from said owner or person in charge of the same for more than 5 consecutive hours, such person shall, for every such offense, be punished in the same manner provided in § 22-801. (Aug. 23, 1871, Leg. Assem., p. 138, ch. 106, § 10; June 25, 1892, 27 Stat. 60, ch. 135, § 4; 1973 Ed., § 22-811.)

Section references. — This section is referred to in §§ 22-806, 22-812 and 22-813.

§ 22-812. Abandonment of maimed or diseased animal; destruction of diseased animals; disposition of animal or vehicle on arrest of driver; scientific experiments.

(a) A person being the owner or possessor or having charge or custody of a maimed, diseased, disabled, or infirm animal who abandons such animal, or leaves it to lie in the street or road, or public place, more than 3 hours after he or she receives notice that it is left disabled, is guilty of a misdemeanor punishable by a fine of not less than \$10 nor more than \$250, or by imprisonment in jail not more than 180 days, or both. Any agent or officer of the Washington Humane Society may lawfully destroy, or cause to be destroyed, any animal found abandoned and not properly cared for, appearing, in the judgment of 2 reputable citizens called by such officer to view the same in such officer's presence, to be glandered, injured, or diseased past recovery for any useful purpose. When any person arrested is, at the time of such arrest, in charge of any animal, or of any vehicle drawn by any animal, or containing any animal, any agent of said society may take charge of such animal and such vehicle and its contents and deposit the same in a place of safe custody or deliver the same into the possession of the police authorities, who shall assume the custody thereof; and all necessary expenses incurred in taking charge of such property shall be a lien thereon.

(b) Nothing contained in §§ 22-801 to 22-809, inclusive, and §§ 22-811 and 22-1109 shall be construed to prohibit or interfere with any properly conducted scientific experiments or investigations, which experiments shall be performed only under the authority of the faculty of some regularly incorporated medical college, university, or scientific society. (Aug. 23, 1871, Leg. Assem., p. 138, ch. 106, § 11; June 25, 1892, 27 Stat. 60, ch. 135, § 4; 1973 Ed., § 22-812; May 21, 1994, D.C. Law 10-119, § 6, 41 DCR 1639; Aug. 20, 1994, D.C. Law 10-151, § 102(b), 41 DCR 2608.)

Effect of amendments. — D.C. Law 10-119, in (a), inserted "or she" in the first sentence; and substituted "such officer" for "him" and "such officer's" for "his" in the second sentence.

D.C. Law 10-151 substituted "180 days" for "1 year" in the first sentence of (a).

Emergency act amendments. — For temporary amendment of section, see § 102(b) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-119. — Law 10-119, the "Anti-Gender Discriminatory Lan-

guage Criminal Offenses Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Legislative history of Law 10-151. — See note to § 22-801.

§ 22-813. Definitions.

In §§ 22-801 to 22-809, inclusive, and § 22-811, the word "animals" or "animal" shall be held to include all living and sentient creatures (human beings excepted), and the words "owner," "persons," and "whoever" shall be held to include corporations and incorporated companies as well as individu-

als. (Aug. 23, 1871, Leg. Assem., p. 138, ch. 106, § 12; June 25, 1892, 27 Stat. 60, ch. 135, § 3; 1973 Ed., § 22-813.)

Section references. — This section is referred to in § 22-806.

§ 22-814. Docking tails of horses.

Whoever cuts the solid part of the tail of any horse in the operation known as docking, and whoever shall cause the same to be done or assist in doing such cutting (unless the same is proved to be of benefit to the horse), shall, upon conviction thereof, be punished by imprisonment not exceeding 1 year or fine of not less than \$100 nor more than \$250. (June 25, 1892, 27 Stat. 61, ch. 135, § 5; Mar. 2, 1911, 36 Stat. 1003, ch. 192; 1973 Ed., § 22-814; May 10, 1989, D.C. Law 7-231, § 29, 36 DCR 492.)

Section references. — This section is referred to in § 22-806.

Legislative history of Law 7-231. — Law 7-231, the "Technical Amendments Act of 1988," was introduced in Council and assigned Bill No. 7-586, which was referred to the Committee

of the Whole. The Bill was adopted on first and second readings on November 29, 1988 and December 13, 1988, respectively. Signed by the Mayor on January 6, 1989, it was assigned Act No. 7-285 and transmitted to both Houses of Congress for its review.

CHAPTER 9. CRUELTY TO CHILDREN.

Sec.

22-901. Definition and penalty.

22-902. Refusal or neglect of guardian to provide for child under 14 years of age.

Sec.

22-903 to 22-906. [Repealed].

§ 22-901. Definition and penalty.

(a) A person commits the crime of cruelty to children in the first degree if that person intentionally, knowingly, or recklessly tortures, beats, or otherwise willfully maltreats a child under 18 years of age or engages in conduct which creates a grave risk of bodily injury to a child, and thereby causes bodily injury.

(b) A person commits the crime of cruelty to children in the second degree if that person intentionally, knowingly, or recklessly:

(1) Maltreats a child or engages in conduct which causes a grave risk of bodily injury to a child; or

(2) Exposes a child, or aids and abets in exposing a child in any highway, street, field house, outhouse or other place, with intent to abandon the child.

(c)(1) Any person convicted of cruelty to children in the first degree shall be fined not more than \$10,000 or be imprisoned not more than 15 years, or both.

(2) Any person convicted of cruelty to children in the second degree shall be fined not more than \$10,000 or be imprisoned not more than 10 years, or both. (Feb. 13, 1885, 23 Stat. 303, ch. 58, § 3; Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 814; 1973 Ed., § 22-901; May 21, 1994, D.C. Law 10-119, § 7, 41 DCR 1639; Aug. 20, 1994, D.C. Law 10-151, § 201, 41 DCR 2608.)

Cross references. — As to exception of child witness' testimony from corroboration requirement, see § 23-114.

Effect of amendments. — D.C. Law 10-119 substituted "his or her" for "his."

D.C. Law 10-151 rewrote this section.

Neither D.C. Law 10-119 nor D.C. Law 10-151 referred to the other, and effect has been given to D.C. Law 10-151.

Emergency act amendments. — For temporary amendment of section, see § 201 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-119. — Law 10-119, the "Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Legislative history of Law 10-151. — Law 10-151, the "Omnibus Criminal Justice Reform

Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

Offense part of common law assault. — The offense proscribed by this section, while not expressed in terms of assault, comes within the common law concept of that offense. *Beausoliel v. United States*, 107 F.2d 292 (D.C. Cir. 1939).

Intent or state of mind. — The offense described in this section is a general intent crime, which also requires a showing of malice. *Carson v. United States*, App. D.C., 556 A.2d 1076 (1989).

Evil state of mind necessary. — In the prosecution of a mother who left her children chained in her home while she was absent, an instruction that the jury should decide whether the mother was acting reasonably under the circumstances or whether her action was unreasonable and dangerous was reversibly erroneous because of an omission of the require-

ment of an evil state of mind. *Mullen v. United States*, 263 F.2d 275 (D.C. Cir. 1958); *United States v. Thomas*, 459 F.2d 1172 (D.C. Cir. 1972); *Smith v. United States*, App. D.C., 309 A.2d 58 (1973).

And prosecution to prove intent beyond reasonable doubt. — In a prosecution on charges of cruelty to a child and assault with a dangerous weapon, namely, a belt, intent is an essential element of the offenses and, hence, has to be proved by the prosecution beyond a reasonable doubt. *Robinson v. United States*, App. D.C., 317 A.2d 508 (1974).

Malice. — A parent acts with malice when a parent acts out of a desire to inflict pain rather than out of genuine effort to correct the child, or when the parent, in a genuine effort to correct the child, acts with a conscious disregard that serious harm will result. *Carson v. United States*, App. D.C., 556 A.2d 1076 (1989).

Offense may be committed through agent. — One may be guilty of an offense under this section where the prohibited act is committed through the agency of mechanical or chemical means, as by instruments, poison or powder, or by an animal, child, or other innocent agent, acting under the direction and compulsion of the accused. *Beausoliel v. United States*, 107 F.2d 292 (D.C. Cir. 1939).

This section is limited to dangerous acrobatics, and, to support a conviction thereunder, the government must prove acts of recklessness which endanger life or limb. *Nesbitt v. United States*, App. D.C., 205 A.2d 595 (1964).

Charge of cruelty to child does not merge into manslaughter conviction, in that a count charging cruelty has societal purposes, as well as essential elements, differing from those in a count which charges second degree murder. *United States v. Thomas*, 459 F.2d 1172 (D.C. Cir. 1972).

Nor assault with deadly weapon. — The defendant's action in holding a child under a shower in such a manner as to cause the child to fight for air and in repeatedly slapping and kicking the child after removing him from the shower supports a verdict of guilty on a charge of cruelty to the child, irrespective of the fact that the child was also beaten with a belt and the defendant was also convicted of assault with a dangerous weapon. *Robinson v. United States*, App. D.C., 317 A.2d 508 (1974).

Cited in *Jones v. United States*, 308 F.2d 307 (D.C. Cir. 1962); *United States v. Burks*, 470 F.2d 432 (D.C. Cir. 1972); *Cohoon v. United States*, App. D.C., 387 A.2d 1098 (1978); *United States v. Peoples*, 116 WLR 1161 (Super. Ct. 1988); *Regalado v. United States*, App. D.C., 572 A.2d 416 (1990); *In re U.F.*, 118 WLR 541 (Super. Ct. 1990); *Raboya v. Shrybman & Assocs.*, 777 F. Supp. 58 (D.D.C. 1991); *Johnson v. United States*, App. D.C., 616 A.2d 1216 (1992), cert. denied, 507 U.S. 996, 113 S. Ct. 1611, 123 L. Ed. 2d 172 (1993); *In re A.J.*, 120 WLR 725 (Super. Ct. 1992); *Johnson v. United States*, App. D.C., 631 A.2d 871 (1993).

§ 22-902. Refusal or neglect of guardian to provide for child under 14 years of age.

Any person within the District of Columbia, of sufficient financial ability, who shall refuse or neglect to provide for any child under the age of 14 years, of which he or she shall be the parent or guardian, such food, clothing, and shelter as will prevent the suffering and secure the safety of such child, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be subject to punishment by a fine of not more than \$100, or by imprisonment in the Workhouse of the District of Columbia for not more than 3 months, or both such fine and imprisonment. (Mar. 3, 1901, 31 Stat. 1095, ch. 847, § 4; 1973 Ed., § 22-902.)

Cross references. — As to proceedings regarding intrafamily offenses, see § 16-1001 et seq.

There exists parental duty at law to provide medical care for dependent minor offspring. *Faunteroy v. United States*, App. D.C., 413 A.2d 1294 (1980).

As medical care constitutes one of necessities in life of infant, necessities which have always fallen under the rubric of food, clothing, and shelter. *Faunteroy v. United States*, App. D.C., 413 A.2d 1294 (1980).

Cited in *In re A.J.*, 120 WLR 725 (Super. Ct. 1992).

§§ 22-903 to 22-906. Wilful neglect or refusal to support wife or minor child; punishment; order of allowance; recognizance; trial under original charge; evidence of marriage; competency of witnesses; proof of wilful desertion; weekly payments by Superintendent of Workhouse for each day's confinement; collections by Clerk of Court to be deposited with Collector of Taxes and covered into Treasury.

Repealed. July 29, 1970, 84 Stat. 586, Pub. L. 91-358, title I, § 165(a)(b).

§ 22-1001

CRIMINAL OFFENSES

CHAPTER 10. FORNICATION.

Sec.

22-1001. [Repealed].

22-1002. Fornication.

§ 22-1001. Fornication.

Repealed. June 25, 1948, 62 Stat. 864, ch. 645, § 21.

§ 22-1002. Fornication.

If any unmarried man or woman commits fornication in the District, each shall be fined not more than \$300 or imprisoned not more than 6 months, or both. (June 29, 1953, 67 Stat. 99, ch. 150, § 214; 1973 Ed., § 22-1002.)

Cited in *Pelicone v. Hodges*, 320 F.2d 754
(D.C. Cir. 1963).

CHAPTER 11. DISTURBANCES OF THE PUBLIC PEACE.

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| <p>Sec.
 22-1101. Affrays.
 22-1102. Duelling challenges.
 22-1103. Assault on refusal to accept challenge.
 22-1104. Leaving District to give or receive challenge.
 22-1105, 22-1106. [Repealed].
 22-1107. Unlawful assembly; profane and indecent language.
 22-1108. Playing games in streets.
 22-1109. Throwing stones or other missiles.
 22-1110. Urging dogs to fight or create disorder.
 22-1111. Allowing dogs to go at large.</p> | <p>Sec.
 22-1112. Lewd, indecent, or obscene acts.
 22-1113. Kindling bonfires.
 22-1114. Disturbing religious congregation.
 22-1115. [Repealed].
 22-1116. [Repealed].
 22-1117. Flying fire balloons or parachutes.
 22-1118. Driving or riding on footways in public grounds.
 22-1119. False alarm of fire; prosecution.
 22-1120. Sale of tobacco to minors under 18 years of age.
 22-1121. Disorderly conduct.
 22-1122. Rioting or inciting to riot.</p> |
|---|---|

§ 22-1101. Affrays.

Whoever is convicted of an affray in the District shall be fined not more than \$1,000 or imprisoned not more than 180 days, or both. (July 16, 1912, 37 Stat. 192, ch. 235, § 1; Dec. 23, 1963, 77 Stat. 617, Pub. L. 88-241, § 11(a); 1973 Ed., § 22-1101; Aug. 20, 1994, D.C. Law 10-151, § 107, 41 DCR 2608.)

Cross references. — As to assaults because of gaming losses, see § 22-508.

Effect of amendments. — D.C. Law 10-151 substituted “\$1,000” for “\$500” and substituted “180 days” for “1 year.”

Emergency act amendments. — For temporary amendment of section, see § 107 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — Law 10-151, the “Omnibus Criminal Justice Reform

Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

§ 22-1102. Duelling challenges.

If any person shall in the District challenge another to fight a duel, or send or deliver any written or verbal message purporting or intended to be such challenge, or shall accept any such challenge or message, or shall knowingly carry or deliver an acceptance of such challenge or message to fight a duel in or out of the District, such person shall be punished by imprisonment for a term not exceeding 10 years. (Mar. 3, 1901, 31 Stat. 1328, ch. 854, § 852; 1973 Ed., § 22-1102; May 21, 1994, D.C. Law 10-119, § 2(f), 41 DCR 1639.)

Effect of amendments. — D.C. Law 10-119 substituted “such person” for “he” near the end.

Legislative history of Law 10-119. — Law 10-119, the “Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-332, which was referred to the

Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

§ 22-1103. Assault for refusal to accept challenge.

If any person shall assault, beat, or wound, or cause to be assaulted, beaten, or wounded, any person in the District for refusing to accept such challenge, or cause such person to be published or posted as a coward, or use other opprobrious language in such publication tending to degrade and disgrace such person for so declining or refusing such challenge, he or she shall be punished by imprisonment for a term not exceeding 3 years. (Mar. 3, 1901, 31 Stat. 1328, ch. 854, § 853; 1973 Ed., § 22-1103; May 21, 1994, D.C. Law 10-119, § 2(g), 41 DCR 1639.)

Effect of amendments. — D.C. Law 10-119 substituted “such person” for “him” twice, and substituted “he or she” for “he.”

Legislative history of Law 10-119. — See note to § 22-1102.

§ 22-1104. Leaving District to give or receive challenge.

If any person, for the purpose of evading the provisions aforesaid, shall leave the District, by previous arrangement or concert within the same, with intent to give or receive any such challenge without the District, and shall give or receive the same accordingly, the person or persons so offending shall be punished in the same manner as if said challenge had been given and received within the District. (Mar. 3, 1901, 31 Stat. 1328, ch. 854, § 854; 1973 Ed., § 22-1104.)

 §§ 22-1105, 22-1106. Prize fights and animal fights prohibited; “pugilistic encounter” defined.

Repealed. June 25, 1948, 62 Stat. 862, ch. 645, § 21.

§ 22-1107. Unlawful assembly; profane and indecent language.

It shall not be lawful for any person or persons within the District of Columbia to congregate and assemble in any street, avenue, alley, road, or highway, or in or around any public building or inclosure, or any park or reservation, or at the entrance of any private building or inclosure, and engage in loud and boisterous talking or other disorderly conduct, or to insult or make rude or obscene gestures or comments or observations on persons passing by, or in their hearing, or to crowd, obstruct, or incommode, the free use of any such street, avenue, alley, road, highway, or any of the foot pavements thereof, or the free entrance into any public or private building or inclosure; it shall not be lawful for any person or persons to curse, swear, or make use of any profane language or indecent or obscene words, or engage in any disorderly conduct in any street, avenue, alley, road, highway, public park or inclosure, public building, church, or assembly room, or in any other public place, or in any place wherefrom the same may be heard in any street, avenue, alley, road, highway, public park or inclosure, or other building, or in any premises other than those where the offense was committed, under a penalty of not more than \$250 or

imprisonment for not more than 90 days, or both for each and every such offense. (July 29, 1892, 27 Stat. 323, ch. 320, § 6; July 8, 1898, 30 Stat. 723, ch. 638; June 29, 1953, 67 Stat. 97, ch. 159, § 210; 1973 Ed., § 22-1107.)

- I. General Consideration.
- II. Unlawful Congregation and Assembly.
- III. Unlawful Utterances or Conduct.

I. GENERAL CONSIDERATION.

Cross references. — As to prosecutions, see § 22-109.

As to disorderly conduct in public buildings and grounds, see § 22-3111.

As to prohibition of defacement of public or private building or property, see § 22-3112.1.

As to prohibition of burning of cross or other religious symbol, see § 22-3112.2.

As to prohibition of wearing of masks for specified purposes, see § 22-3112.3.

As to penalties for violation of §§ 22-3112.1 to 22-3112.3, see § 22-3112.4.

Section references. — This section is referred to in § 23-101.

Thrust of this section is to bar loud and raucous behavior. *United States v. Botts*, 110 WLR 1257 (Super. Ct. 1982).

Simply talking back to policeman does not justify arrest for disorderly conduct. *Von Sleichter v. United States*, 472 F.2d 1244 (D.C. Cir.), cert. denied, 409 U.S. 1063, 93 S. Ct. 555, 34 L. Ed. 2d 517 (1972).

Evidence sufficient to sustain conviction for disorderly conduct and simple assault. — See *Duncan v. United States*, App. D.C., 219 A.2d 110 (1966), modified, 379 F.2d 148 (D.C. Cir. 1967); *Dempsey v. United States*, App. D.C., 251 A.2d 650 (1969).

Cited in *Heilman v. District of Columbia*, App. D.C., 172 A.2d 141 (1961); *Stone v. District of Columbia*, 359 F.2d 275 (D.C. Cir. 1966); *Pinkney v. United States*, 363 F.2d 696 (D.C. Cir. 1966); *Johnson v. United States*, 370 F.2d 489 (D.C. Cir. 1966); *Feeley v. District of Columbia*, 387 F.2d 216 (D.C. Cir. 1967); *Smith v. District of Columbia*, 387 F.2d 233 (D.C. Cir. 1967); *District of Columbia v. Barry*, 387 F.2d 860 (D.C. Cir. 1967); *Harris v. United States*, 402 F.2d 205 (D.C. Cir. 1968); *District of Columbia v. Grimes*, 404 F.2d 1337 (D.C. Cir. 1968); *Coleman v. District of Columbia*, App. D.C., 250 A.2d 555 (1969); *Von Sleichter v. United States*, App. D.C., 267 A.2d 336 (1970), aff'd, 472 F.2d 1244 (D.C. Cir.), cert. denied, 409 U.S. 1063, 93 S. Ct. 555, 34 L. Ed. 2d 517 (1972); *United States v. Jones*, App. D.C., 275 A.2d 541 (1971); *Horowitz v. District of Columbia*, App. D.C., 291 A.2d 202 (1972); *Shiel v. United States*, App. D.C., 515 A.2d 405 (1986), cert. denied, 485 U.S. 1010, 108 S. Ct. 1477, 99 L. Ed. 2d 706 (1988); *United States v. Kennedy*, 118 WLR 873 (Super. Ct. 1990).

II. UNLAWFUL CONGREGATION AND ASSEMBLY.

Both assembly and overt act necessary for offense. — At common law, the mere act of assembling was not unlawful, unless it was for an unlawful purpose. Neither is a peaceful assembly unlawful under this section, which does not condemn the mere act of assembling on the street but prohibits assembling and congregating, coupled with the doing of the forbidden acts. In other words, at common law the assembly must be for an unlawful purpose, and, when 3 or more persons so assembled, the offense was complete without the commission of any additional overt criminal act; but this section requires both the assembly and the commission of 1 of the acts forbidden by this section to constitute unlawful assembly: Both the assembling and the overt act are essential to make the offense. *Hunter v. District of Columbia*, 47 App. D.C. 406 (1918).

A defendant cannot be convicted of engaging in loud and boisterous talking and other disorderly conduct where the requisite element of congregating and assembling was neither charged nor proved. *Franklin v. District of Columbia*, App. D.C., 248 A.2d 677 (1968).

Congregation and assembly must threaten peace to be punishable. — Where an information charging a violation of this section, forbidding persons to congregate and assemble on a public street and crowd, obstruct, or incommode the free use of the street fails to charge that the act was done under circumstances threatening a breach of peace, it does not charge an offense and a conviction on it cannot stand. *Adams v. United States*, App. D.C., 256 A.2d 563 (1969).

"Congregate and assemble" provision of this section requires presence of 3 or more persons acting in concert for an unlawful purpose. *Kilnoy v. District of Columbia*, 400 F.2d 761 (D.C. Cir. 1968).

Section attempts to prohibit conduct not covered by § 22-3102. — The distinction between public and private locations in this section can be explained primarily as an attempt to prohibit conduct blocking private property not covered by § 22-3102. *Morgan v. District of Columbia*, App. D.C., 476 A.2d 1128 (1984).

Driveway can be part of "entrance" to private building. *Morgan v. District of Columbia*, App. D.C., 476 A.2d 1128 (1984).

Proof of general criminal intent and absence of exculpatory state of mind required. — While specific intent is not required to be convicted of unlawful assembly, proof of general criminal intent, i.e., intent to do the act and the absence of an exculpatory state of mind, is required. *Morgan v. District of Columbia*, App. D.C., 476 A.2d 1128 (1984).

Evidence insufficient to sustain conviction for obstruction of free use of public building. — See *Lange v. United States*, 443 F.2d 720 (D.C. Cir. 1971).

III. UNLAWFUL UTTERANCES OR CONDUCT.

Prohibition of profane or obscene language in public is constitutional only if interpreted to include the requirement that the language used created a substantial risk of provoking violence or was so grossly offensive as to constitute a nuisance. In *re M.W.G.*, App. D.C., 427 A.2d 440 (1981).

Public vehicle deemed "public place". — A public vehicle, such as a taxicab plying its business on a public street, is a "public place" within this section. *Morris v. District of Columbia*, App. D.C., 31 A.2d 652 (1943).

Indecent and obscene words must threaten peace to be punishable. — An information charging that a defendant used profane language and indecent and obscene words is defective if it fails to allege that such conduct threatened a breach of peace. *Williams v. District of Columbia*, 419 F.2d 638 (D.C. Cir. 1969); In *re M.W.*, App. D.C., 383 A.2d 646 (1978).

To justify a disorderly conduct or similar arrest, the words uttered must be lewd, obscene, insulting, fighting words which tend, by their very nature, to incite a breach of the peace. *Stewart v. United States*, 428 F. Supp. 321 (D.D.C. 1976).

Or must amount to nuisance. — This section is not applicable for the mere use of indecent or obscene words, but only if the language is, under contemporary community

standards, so grossly offensive to members of the public who actually overhear it as to amount to a nuisance. *Von Schlechter v. United States*, 472 F.2d 1244 (D.C. Cir.), cert. denied, 409 U.S. 1063, 93 S. Ct. 555, 34 L. Ed. 2d 517 (1972).

But presence of third party not required. — Under this section, the presence of others than the offender and the person addressed is not necessary to complete the offense. *Morris v. District of Columbia*, App. D.C., 31 A.2d 652 (1943).

Individual actions not applied to group of protesters. — It was not a violation of this section for one member of a group of protesters to obstruct the progress of a construction truck where there was no evidence that the demonstrators as a group blocked the truck or lent support or encouragement to the defendant's action. *Odum v. District of Columbia*, App. D.C., 565 A.2d 302 (1989).

All surrounding circumstances to be considered. — In determining whether the defendant's remarks were within the prohibition of this section, the trial judge was entitled to consider all surrounding circumstances, time of occurrence and manner in which it occurred, repetition of the remarks, as well as lack of previous acquaintance. *Morris v. District of Columbia*, App. D.C., 31 A.2d 652 (1943).

Defendant's conduct determinative as to First Amendment protection. — The defendant's conduct and not the crowd's reaction to it must be the starting point for determining whether the defendant's message was of such nature as to come within the ambit of the free speech guarantee of the First Amendment, as audience reaction and immediacy of disorder become significant elements of proof of disorderly conduct only after a speaker passes the bounds of argument or persuasion and undertakes incitement to riot. *Allen v. District of Columbia*, App. D.C., 187 A.2d 888 (1963).

Evidence sufficient for remarks "indecent" and "obscene" within this section. — See *Franklin v. District of Columbia*, App. D.C., 248 A.2d 677 (1968).

§ 22-1108. Playing games in streets.

It shall not be lawful for any person or persons to play the game of football, or any other game with a ball, in any of the streets, avenues, or alleys in the City of Washington; nor shall it be lawful for any person or persons to play the game of bandy, shindy, or any other game by which a ball, stone, or other substance is struck or propelled by any stick, cane, or other substance in any street, avenue, or alley in the City of Washington, under a penalty of not more than \$5 for each and every such offense. (July 29, 1892, 27 Stat. 325, ch. 320, § 17; Feb. 11, 1895, 28 Stat. 650, ch. 79; 1973 Ed., § 22-1108.)

Cross references. — As to prosecutions, see § 22-109.

Cited in Bateman v. Crim, App. D.C., 34 A.2d 257 (1943).

§ 22-1109. Throwing stones or other missiles.

It shall not be lawful for any person or persons within the District of Columbia to throw any stone or other missile in any street, avenue, alley, road, or highway, or open space, or public square, or inclosure, or to throw any stone or other missile from any place into any street, avenue, road, or highway, alley, open space, public square, or inclosure, under a penalty of not more than \$5 for every such offense. (July 29, 1892, 27 Stat. 322, ch. 320, § 3; 1973 Ed., § 22-1109.)

Cross references. — As to prosecutions, see § 22-109.

Section references. — This section is referred to in § 22-812.

§ 22-1110. Urging dogs to fight or create disorder.

It shall not be lawful for any person or persons to entice, induce, urge, or cause any dogs to engage in a fight in any street, alley, road, or highway, open space, or public square in the District of Columbia, or to urge, entice, or cause such dogs to continue or prolong such fight, under a penalty of not more than \$1,000 for each and every offense; and any person or persons who shall induce or cause any animal of the dog kind to run after, bark at, frighten, or bite any person, horse, or horses, cows, cattle of any kind, or other animals lawfully passing along or standing in or on any street, avenue, road, or highway, or alley in the District of Columbia, shall forfeit and pay for such offense a sum not exceeding \$1,000. (July 29, 1892, 27 Stat. 324, ch. 320, § 10; 1973 Ed., § 22-1110; Oct. 18, 1988, D.C. Law 7-176, § 7, 35 DCR 4787; Aug. 20, 1994, D.C. Law 10-151, § 104, 41 DCR 2608.)

Cross references. — As to prosecutions, see § 22-109.

Effect of amendments. — D.C. Law 10-151 substituted “\$1,000” for “\$2,500” twice.

Emergency act amendments. — For temporary amendment of section, see § 104 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 7-176. — Law 7-176, the “Dangerous Dog Amendment Act of

1988,” was introduced in Council and assigned Bill No. 7-276, which was referred to the Committee on Human Services. The Bill was adopted on first and second readings on May 17, 1988 and May 31, 1988, respectively. Signed by the Mayor on June 9, 1988, it was assigned Act No. 7-190 and transmitted to both Houses of Congress for its review.

Legislative history of Law 10-151. — See note to § 22-1101.

§ 22-1111. Allowing dogs to go at large.

(a) If any owner or possessor of a fierce or dangerous dog shall permit the same to go at large, knowing said dog to be fierce or dangerous, to the danger or annoyance of the inhabitants, he shall upon conviction thereof, be punished by a fine not exceeding \$5,000; and if such animal shall attack or bite any person, the owner or possessor thereof shall, on conviction, be punished by a fine not exceeding \$10,000, and in addition to such punishment the court shall adjudge and order that such animal be forthwith delivered to the poundmaster,

and said poundmaster is hereby authorized and directed to kill such animal so delivered to him.

(b) If any owner or possessor of a female dog shall permit her to go at large in the District of Columbia while in heat, he shall, upon conviction thereof, be punished by a fine not exceeding \$20. (June 19, 1878, 20 Stat. 174, ch. 323, § 9; June 30, 1902, 32 Stat. 547, ch. 1332; 1973 Ed., § 22-1111; Oct. 18, 1988, D.C. Law 7-176, § 7(f), 35 DCR 4787.)

Legislative history of Law 7-176. — See note to § 22-1110.

When owner liable for conduct of dog. — An owner is not liable for the conduct of his dog

unless he has or is charged with knowledge of the dog's vicious propensities. *Bardwell v. Petty*, 286 F. 772 (D.C. Cir. 1923).

§ 22-1112. Lewd, indecent, or obscene acts.

(a) It shall not be lawful for any person or persons to make any obscene or indecent exposure of his or her person, or to make any lewd, obscene, or indecent sexual proposal, or to commit any other lewd, obscene, or indecent act in the District of Columbia, under penalty of not more than \$300 fine, or imprisonment of not more than 90 days, or both, for each and every such offense.

(b) Any person or persons who shall commit an offense described in subsection (a) of this section, knowing he or she or they are in the presence of a child under the age of 16 years, shall be punished by imprisonment of not more than 1 year, or fined in an amount not to exceed \$1,000, or both, for each and every such offense. (July 29, 1892, 27 Stat. 324, ch. 320, § 9; July 8, 1898, 30 Stat. 724, ch. 638; Sept. 26, 1942, 56 Stat. 760, ch. 565; June 9, 1948, 62 Stat. 346, ch. 428, title I, § 101; June 29, 1953, 67 Stat. 92, ch. 159, § 202(a)(1); 1973 Ed., § 22-1112.)

Cross references. — As to prosecutions, see § 22-109.

As to obscene matters, see § 22-2001.

As to prohibition of sexual performances using minors, see subchapter II of Chapter 20 of this title.

Section references. — This section is referred to in §§ 22-109 and 23-101.

This section is unconstitutionally vague in failing to give clear notice of what conduct is forbidden and in investing police with excessive discretion to decide, after the fact, who has violated the law, and this section cannot be sustained on the theory that a police department practice supported the construction of this section to mean the deliberate touching in public of one's own or another's genitals for the purpose of sexual arousal or on the theory that the indelicacy of the subject matter excused the failure to spell out precisely the acts covered. *District of Columbia v. Walters*, App. D.C., 319 A.2d 332, cert. denied and appeal dismissed, 419 U.S. 1065, 95 S. Ct. 650, 42 L. Ed. 2d 661 (1974).

But "sexual proposal" clause constitu-

tional. — The "sexual proposal" clause of this section may be fairly construed to proscribe only proposals to commit sodomy, indecent exposure or, in case of sexual proposals addressed to children, to perform some sexual act, and, as so construed, it is not so vague as to amount to deprivation of due process of law. *District of Columbia v. Garcia*, App. D.C., 335 A.2d 217, cert. denied, 423 U.S. 894, 96 S. Ct. 192, 46 L. Ed. 2d 125 (1975).

Subsection (a) and § 22-2701 overlap in prohibiting invitations to sodomy. *Lutz v. United States*, App. D.C., 434 A.2d 442 (1981).

"Indecent" exposure. — An exposure becomes indecent when a defendant exposes himself at such a time and place where, as a reasonable man, he knows or should know that his act will be open to observation by others. *Peyton v. District of Columbia*, App. D.C., 100 A.2d 36 (1953); *Hearn v. District of Columbia*, App. D.C., 178 A.2d 434 (1962).

Public exposure of the bare buttocks is not a violation of this statute prohibiting indecent exposure. *Duvallon v. District of Columbia*, App. D.C., 515 A.2d 724 (1986).

"Exposure of person" defined. — Indecent exposure of his or her person is the indecent exposure of the human genitalia. *Duvallon v. District of Columbia*, App. D.C., 515 A.2d 724 (1986).

Nudity is not per se "obscene." *Hearn v. District of Columbia*, App. D.C., 178 A.2d 434 (1962).

Criminal intent must be shown in a prosecution for indecent exposure before a conviction can be upheld, and, though the exposure must be intentional and not accidental, the intent required is only a general one and need not be directed toward any specific person or persons. *Peyton v. District of Columbia*, App. D.C., 100 A.2d 36 (1953); *Hearn v. District of Columbia*, App. D.C., 178 A.2d 434 (1962); *Selph v. District of Columbia*, App. D.C., 188 A.2d 344 (1963).

Open or public act in common law sense is no longer required, although this section also is not designed or intended to apply to an act committed in the privacy or presence of a single, consenting person. *Rittenour v. District of Columbia*, App. D.C., 163 A.2d 558 (1960).

Ordinary acts involving exposure as result of carelessness or thoughtlessness, particularly when such acts take place within privacy of one's home, do not in themselves establish the offense of indecent exposure. *Selph v. District of Columbia*, App. D.C., 188 A.2d 344 (1963).

Hotel wash room deemed "public place". — An unlocked wash room in a hotel in which an indecent act occurred was a public place, and fact that other participant willingly engaged did not relieve defendant from guilt in committing such act in public. *Herland v. District of Columbia*, App. D.C., 182 A.2d 362 (1962).

There must be corroboration in sex offenses, especially where the offense is purely verbal and proof disappears as soon as the words are spoken, but the government is not required to produce a witness who actually heard the words spoken, as corroboration may consist of circumstantial evidence supporting the prosecutrix's story. *Goodsaid v. District of Columbia*, App. D.C., 187 A.2d 486 (1963), cert. denied, 375 U.S. 867, 84 S. Ct. 141, 11 L. Ed. 2d 94 (1963); *Haynes v. District of Columbia*, App. D.C., 204 A.2d 574 (1964).

The testimony of a single witness to a verbal invitation to sodomy should be received and considered with great caution. *Reed v. District of Columbia*, App. D.C., 226 A.2d 581 (1967).

But corroboration not necessary with indecent exposure. — Corroboration of the arresting officer's testimony is not required to establish the corpus delicti and to sustain a conviction for indecent exposure. *Nassif v. District of Columbia*, App. D.C., 219 A.2d 495 (1966).

Elements of lewd, obscene or indecent proposals. — Words used in cases under this section may or may not be obscene in themselves; what matters is that the sexual acts proposed are lewd, obscene or indecent and lawfully prohibited by statute, not the character of the particular words in which the proposal is framed. *District of Columbia v. Garcia*, App. D.C., 335 A.2d 217, cert. denied, 423 U.S. 894, 96 S. Ct. 192, 46 L. Ed. 2d 125 (1975).

"Lewd, obscene or indecent" defined. — Of the various forms of sexual conduct prohibited by statute, such as, adultery, indecent exposure, incest, fornication, seduction, indecent liberties with children and sodomy, only sodomy, indecent exposure and indecent sexual acts with children can reasonably be deemed "lewd, obscene or indecent," within the meaning of this section, with the result that the "sexual proposal" clause of this section can be fairly construed to prohibit only proposals to commit sodomy, indecent exposure or, in the case of sexual proposals with children, to perform some sexual act. *District of Columbia v. Garcia*, App. D.C., 335 A.2d 217, cert. denied, 423 U.S. 894, 96 S. Ct. 192, 46 L. Ed. 2d 125 (1975).

Voir dire questions. — The trial court did not abuse its discretion in failing to ask the jury panel specifically whether they would be influenced by the fact that the case involved "sex crimes with little girls" since defendant himself covered this question in substance when he asked the jury whether their impartiality would be affected by the fact that the crime, which they knew was a sex crime, involved children. *Harlee v. District of Columbia*, App. D.C., 558 A.2d 351 (1989).

Evidence sufficient to sustain conviction for obscene and indecent exposure. — See *Campbell v. District of Columbia*, App. D.C., 172 A.2d 557 (1961); *Haynes v. District of Columbia*, App. D.C., 202 A.2d 919 (1964); *Nassif v. District of Columbia*, App. D.C., 219 A.2d 495 (1966).

Evidence sufficient to sustain conviction for making indecent sexual proposal. — See *Howard v. District of Columbia*, App. D.C., 132 A.2d 150 (1957).

Evidence sufficient to sustain conviction for committing lewd, obscene or indecent act. — See *McGhee v. District of Columbia*, App. D.C., 137 A.2d 721 (1958).

Evidence insufficient to sustain conviction for committing lewd, obscene or indecent act. — See *Caul v. District of Columbia*, App. D.C., 164 A.2d 350 (1960).

Cited in *Guarro v. United States*, 237 F.2d 578 (D.C. Cir. 1956); *Lomax v. District of Columbia*, App. D.C., 211 A.2d 772 (1965); *Pinkney v. United States*, 363 F.2d 696 (D.C. Cir. 1966); *Lord v. District of Columbia*, App. D.C., 235 A.2d 322 (1967); *Millard v. Harris*,

406 F.2d 964 (D.C. Cir. 1968); Shannon v. United States, App. D.C., 319 A.2d 135 (1974); Rose v. United States, App. D.C., 535 A.2d 849 (1987); In re A.B., App. D.C., 556 A.2d 645 (1989).

§ 22-1113. Kindling bonfires.

It shall not be lawful for any person or persons within the limits of the District of Columbia to kindle or set on fire, or be present, aiding, consenting, or causing it to be done, in any street, avenue, road, or highway, alley, open ground, or lot, any box, barrel, straw, shavings, or other combustible, between the setting and rising of the sun; and, any person offending against the provisions of this section shall on conviction thereof, forfeit and pay a sum not exceeding \$10 for each and every offense. (July 29, 1892, 27 Stat. 325, ch. 320, § 14; 1973 Ed., § 22-1113.)

Cross references. — As to prosecutions, see § 22-109.

§ 22-1114. Disturbing religious congregation.

It shall not be lawful for any person or persons to molest or disturb any congregation engaged in any religious exercise or proceedings in any church or place of worship in the District of Columbia; and it shall be lawful for any of the authorities of said churches to arrest or cause to be arrested any person or persons so offending, and take him, her, or them to the nearest police station, to be there held for trial; and any person or persons violating the provisions of this section shall forfeit and pay a fine of not more than \$100 for every such offense. (July 29, 1892, 27 Stat. 324, ch. 320, § 11; 1973 Ed., § 22-1114.)

Cross references. — As to prosecutions, see § 22-109.

As to prohibition of defacement of public or private building or property, see § 22-3112.1.

As to prohibition of burning of cross or other religious symbol, see § 22-3112.2.

As to prohibition of wearing of masks for specified purposes, see § 22-3112.3.

As to penalties for violation of §§ 22-3112.1 to 22-3112.3, see § 22-3112.4.

This section is not unconstitutionally vague for failure to specify the kinds of conduct prohibited at a religious service or to set out standards as to the type of conduct that would amount to an illegal disturbance. *Riley v. District of Columbia*, App. D.C., 283 A.2d 819 (1971), cert. denied, 405 U.S. 1066, 92 S. Ct. 1499, 31 L. Ed. 2d 796 (1972).

This section does not impinge upon First Amendment freedoms. *Riley v. District of Columbia*, App. D.C., 283 A.2d 819 (1971), cert. denied, 405 U.S. 1066, 92 S. Ct. 1499, 31 L. Ed. 2d 796 (1972).

This section is guarantee of free exercise of religion to all persons. *Riley v. District of Columbia*, App. D.C., 283 A.2d 819 (1971), cert. denied, 405 U.S. 1066, 92 S. Ct. 1499, 31 L. Ed. 2d 796 (1972).

Disruptive conduct must be intentional but not necessarily violent. — To justify the imposition of criminal sanctions for disturbing a religious meeting, a person must have intentionally committed an act or acts that are found to have substantially disrupted the service; a conviction cannot be had for conduct that is orderly and within known customs and usages governing religious exercise or proceedings in the church; on the other hand, violence of conduct is not a prerequisite for conviction of disturbing a religious meeting. *Riley v. District of Columbia*, App. D.C., 283 A.2d 819 (1971), cert. denied, 405 U.S. 1066, 92 S. Ct. 1499, 31 L. Ed. 2d 796 (1972).

Cited in *District of Columbia v. Evans*, App. D.C., 225 A.2d 308 (1967).

§ 22-1115. Interference with foreign diplomatic and consular offices, officers, and property — Prohibited.

Repealed. May 7, 1988, D.C. Law 7-105, § 2, 35 DCR 728.

Legislative history of Law 7-105. — Law 7-105, the “Protection for Foreign Officials, Official Guests, and Internationally Protected Persons Amendment Act of 1987,” was introduced in Council and assigned Bill No. 7-59, which was referred to the Committee of the Whole. The Bill was adopted on first and second

readings on December 8, 1987 and January 5, 1988, respectively. The Bill was transmitted to the Mayor on January 12, 1988, and was deemed approved without signature upon expiration of the 10-day mayoral review period. The Bill was assigned Act No. 7-138 and transmitted to both Houses of Congress for its review.

§ 22-1116. Same — Penalties; exception.

Repealed. May 7, 1988, D.C. Law 7-105, § 2, 35 DCR 728.

Legislative history of Law 7-105. — See note to § 22-1115.

§ 22-1117. Flying fire balloons or parachutes.

It shall not be lawful for any person or persons to set up or fly any fire balloon or parachute in or upon or over any street, avenue, alley, open space, public enclosure, or square within the limits of the City of Washington, under a penalty of not more than \$10 for each and every such offense. (July 29, 1892, 27 Stat. 322, ch. 320, § 4; Feb. 11, 1895, 28 Stat. 650, ch. 79; July 29, 1970, 84 Stat. 667, Pub. L. 91-358, title VIII, § 802; 1973 Ed., § 22-1117.)

Cross references. — As to prosecutions, see § 22-109.

§ 22-1118. Driving or riding on footways in public grounds.

If any person shall drive or lead any horse, mule, or other animal, or any cart, wagon, or other carriage whatever on any of the paved or graveled footways in and on any of the public grounds belonging to the United States within the District of Columbia, or shall ride thereon, except at the intersection of streets, alleys, and avenues, each and every such offender shall forfeit and pay for each offense a sum not less than \$1 nor more than \$5. (July 29, 1892, 27 Stat. 325, ch. 320, § 16; 1973 Ed., § 22-1118.)

Cross references. — As to prosecutions, see § 22-109.

§ 22-1119. False alarm of fire; prosecution.

It shall be unlawful for any person or persons to wilfully or knowingly give a false alarm of fire within the District of Columbia, and any person or persons violating the provisions of this section shall upon conviction, be deemed guilty

of a misdemeanor and be punished by a fine not exceeding \$100 or by imprisonment for not more than 6 months, or by both such fine and imprisonment. Prosecutions for violation of the provisions of this section shall be on information filed in the Superior Court of the District of Columbia by the Corporation Counsel of the District of Columbia or by any Assistant Corporation Counsel. (June 8, 1906, 34 Stat. 220, ch. 3055, §§ 1, 2; Apr. 1, 1942, 56 Stat. 190, ch. 207, § 1; July 8, 1963, 77 Stat. 77, Pub. L. 88-60, § 1; July 29, 1970, 84 Stat. 570, Pub. L. 91-358, title I, § 155(a); 1973 Ed., § 22-1119; May 21, 1994, D.C. Law 10-119, § 8, 41 DCR 1639.)

Effect of amendments. — D.C. Law 10-119 substituted “Assistant Corporation Counsel” for “of his assistants” in the second sentence.

Legislative history of Law 10-119. — See note to § 22-1102.

§ 22-1120. Sale of tobacco to minors under 18 years of age.

(a) No person shall sell, give, or furnish any cigarette or other tobacco product to any person under 18 years of age.

(b) Any person who sells any cigarette or other tobacco product who has reasonable cause to believe that a person who attempts to purchase the product is under 18 years of age shall require that the purchaser present identification that indicates his or her age.

(c) Any person who violates subsection (a) or (b) of this section is guilty of a misdemeanor and, upon conviction, shall be fined not more than \$500 or less than \$100, imprisoned not more than 30 days, or both, for the first offense. Any person convicted of a subsequent violation of subsection (a) or (b) of this section shall be fined not more than \$1,000 or less than \$500, imprisoned not more than 90 days, or both.

(d) Any license to sell cigarettes issued pursuant to § 47-2404 may be suspended for a first or second violation of subsection (a) or (b) of this section. The license shall be revoked for a third or subsequent violation of subsection (a) or (b) of this section.

(e)(1) In any place or business where a person sells any cigarette or other tobacco product, the owner, manager, or person in charge of the place or business shall post a warning sign that includes the following: “No person under 18 years of age shall purchase any cigarette or other tobacco product. The United States Surgeon General has issued a warning that smoking causes lung cancer, heart disease, emphysema, and may complicate pregnancy.”

(2) A sign posted pursuant to paragraph (1) of this subsection shall clearly state the maximum fine for a violation of this section. The sign shall be visible to the public at the entrance to the area and on the interior of the area in sufficient number to give notice of the law to the public. (Feb. 7, 1891, 26 Stat. 736, ch. 117; 1973 Ed., § 22-1120; May 2, 1991, D.C. Law 8-262, § 3, 37 DCR 8434.)

Section references. — This section is referred to in § 47-2404.

Legislative history of Law 8-262. — Law 8-262, the “Smoking Regulation Amendment Act of 1990,” was introduced in Council and

assigned Bill No. 8-581, which was referred to the Committee on Public Works. The Bill was adopted on first and second readings on November 20, 1990, and December 4, 1990, respectively. Signed by the Mayor on December 14,

1990, it was assigned Act No. 8-278 and transmitted to both Houses of Congress for its review.

Cited in *Campbell v. District of Columbia*, App. D.C., 32 A.2d 394 (1943); *United States v. Vaughn*, 117 WLR 441 (Super. Ct. 1989).

§ 22-1121. Disorderly conduct.

Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby: (1) acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others; (2) congregates with others on a public street and refuses to move on when ordered by the police; (3) shouts or makes a noise either outside or inside a building during the nighttime to the annoyance or disturbance of any considerable number of persons; (4) interferes with any person in any place by jostling against such person or unnecessarily crowding such person or by placing a hand in the proximity of such person's pocketbook, or handbag; or (5) causes a disturbance in any streetcar, railroad car, omnibus, or other public conveyance, by running through it, climbing through windows or upon the seats, or otherwise annoying passengers or employees, shall be fined not more than \$250 or imprisoned not more than 90 days, or both. (June 29, 1953, 67 Stat. 98, ch. 159, § 211a; 1973 Ed., § 22-1121; May 21, 1994, D.C. Law 10-119, § 9(a), 41 DCR 1639.)

Cross references. — As to prohibition of defacement of public or private building or property, see § 22-3112.1.

As to prohibition of burning of cross or other religious symbol, see § 22-3112.2.

As to prohibition of wearing of masks for specified purposes, see § 22-3112.3.

As to penalties for violation of §§ 22-3112.1 to 22-3112.3, see § 22-3112.4.

Section references. — This section is referred to in § 22-109.

Effect of amendments. — D.C. Law 10-119 substituted "such person" for "him" in (4).

Legislative history of Law 10-119. — See note to § 22-1102.

This section does not violate due process clause of Fifth Amendment although it does not require proof of a breach of peace element; this section does no more than give police the right, within reasonable limitations, to keep the public sidewalks free of unnecessary obstructions and to prevent groups from congregating in such a way that a breach of peace might result. *Scott v. District of Columbia*, App. D.C., 184 A.2d 849 (1962).

Nor unreasonably suppress free communication of views. — The police have a duty to keep streets and sidewalks open for the movement of traffic; hence, the failure-to-move-on provision of this section is a reasonable regulation empowering the police to fulfill such a duty. The provision does no more than that, but, in applying it, the police must direct and control demonstrators only to the extent sufficient to protect legitimate state interests, such as, free

circulation of traffic and free access to public buildings. In ordering obstructive demonstrators to "move on" the initial police objective must be merely to clear passage, not to disperse demonstrators or suppress the free communication of their views. *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107 (D.C. Cir. 1977).

This section must be strictly construed. *Carey v. District of Columbia*, App. D.C., 102 A.2d 314 (1954); *United States v. Botts*, 110 WLR 1257 (Super. Ct. 1982).

Breach of peace deemed element of offense. — One of the elements of offense of disorderly conduct is that the conduct must occur with intent to provoke a breach of the peace or occur under circumstances such that a breach of the peace may be occasioned thereby. *District of Columbia v. Jordan*, App. D.C., 232 A.2d 298 (1967); *Hawkins v. United States*, App. D.C., 399 A.2d 1306 (1979).

But specific intent not required. — Under this section, one lacking the intent to be disorderly may nevertheless be guilty if his conduct is such that a breach of peace may be occasioned thereby. *Rockwell v. District of Columbia*, App. D.C., 172 A.2d 549 (1961).

Nor proof of actual or impending breach of peace. — Proof of actual or impending breach of peace is not required for conviction of disorderly conduct. *Scott v. District of Columbia*, App. D.C., 184 A.2d 849 (1962); *Stovall v. United States*, App. D.C., 202 A.2d 390 (1964).

Neither an actual breach of the peace nor an intent to provoke a breach of peace is an essen-

tial element in the proof of disorderly conduct; it is sufficient that the alleged conduct be under circumstances such that a breach of the peace might be occasioned thereby. *Rodgers v. United States*, App. D.C., 290 A.2d 395 (1972); *United States v. Botts*, 110 WLR 1257 (Super. Ct. 1982).

As long as the alleged offensive conduct rises to the level that a breach of the peace might be provoked by the conduct, it is prohibited by statute. *Chemalali v. District of Columbia*, App. D.C., 655 A.2d 1226, cert. denied, — U.S. —, 116 S. Ct. 76, 133 L. Ed. 2d 35 (1995).

And extreme conduct not necessary. — This section is violated when there is noisy, riotous, or inflammatory behavior provoking a breach of peace, but there can be a violation of this section without such extreme conduct. *Scott v. District of Columbia*, App. D.C., 184 A.2d 849 (1962).

Fixing one's pants over puddle of urine in hallway of partially occupied building at 7 p.m. is an act sufficiently annoying and offensive to others that might occasion a violation of this section. *United States v. Williams*, 754 F.2d 1001 (D.C. Cir. 1985).

Urination in secluded spot not within ambit of section. — Urination in a secluded spot in a parking lot at five o'clock in the morning does not fall within the ambit of this section. *United States v. Botts*, 110 WLR 1257 (Super. Ct. 1982).

Although protected speech and actions not violative of section. — The defendant's activities in counterpicketing another organization by carrying a sign demanding more police brutality for "Reds" and dragging what purported to be the flag of a foreign government on the ground in front of a crowd, which gave no open displays of anger or threats of violence, was within the protection of First Amendment and did not constitute disorderly conduct. *Allen v. District of Columbia*, App. D.C., 187 A.2d 888 (1963).

This section is not constitutionally an impermissible prohibition of an activity protected by the First Amendment. *Rodgers v. United States*, App. D.C., 290 A.2d 395 (1972).

Clause (4) provides notice to public and standards for officials. — The statutory language and history of clause (4) of this section provide potential defendants with sufficient notice and police and courts with adequate standards concerning what conduct is proscribed, viz., touching a person with intent to take that person's pocketbook or handbag and contents. *In re A.B.*, App. D.C., 395 A.2d 59 (1978).

"Handbag" language promotes legislative purpose. — Clause (4)'s prohibition against placing a hand in the proximity of a person's pocketbook or handbag is conduct

readily understood and comports with the apparent legislative intent to prevent pickpocketing by means of physically touching and then stealthily snatching a purse or pocketbook from the victim. *In re A.B.*, App. D.C., 395 A.2d 59 (1978).

And phrase "jostling against" in clause (4) has established objective meaning and contemplates a rough physical touching of 1 individual by another. *In re A.B.*, App. D.C., 395 A.2d 59 (1978).

Peeping in another's window deemed disorderly conduct. — Peeping in the window of an occupied, lighted apartment at 1:30 in the morning constitutes "disorderly conduct" within this breach of peace statute penalizing action tending to "disturb" or be "offensive" to others. *Carey v. District of Columbia*, App. D.C., 102 A.2d 314 (1954); *District of Columbia v. Jordan*, App. D.C., 232 A.2d 298 (1967).

Conviction where directive causes disorderly conduct. — The defendant in ordering his followers into a hostile audience to stop the heckling of a speech and the assault of 1 spectator as a direct result of the defendant's command to his followers, authorized a conviction of disorderly conduct. *Rockwell v. District of Columbia*, App. D.C., 172 A.2d 549 (1961).

Regulation of conduct of bus passengers. — The Washington Metropolitan Area Transit Regulation Compact does not have the authority to promulgate orders regulating the conduct of bus passengers. *District of Columbia v. Jones*, App. D.C., 287 A.2d 816 (1972).

Evidence sufficient to support conviction for disorderly conduct. — See *Sams v. District of Columbia*, App. D.C., 244 A.2d 479 (1968).

Cited in *Frend v. United States*, 100 F.2d 691 (D.C. Cir. 1938), cert. denied, 306 U.S. 640, 59 S. Ct. 488, 83 L. Ed. 1040 (1939); *Heilman v. District of Columbia*, App. D.C., 172 A.2d 141 (1961); *Pinkney v. United States*, 363 F.2d 696 (D.C. Cir. 1966); *Feeley v. District of Columbia*, 387 F.2d 216 (D.C. Cir. 1967); *Smith v. District of Columbia*, 387 F.2d 233 (D.C. Cir. 1967); *Foster v. United States*, 290 A.2d 176 (1972); *Jones v. United States*, App. D.C., 374 A.2d 854 (1977); *District of Columbia v. Tschudin*, App. D.C., 390 A.2d 986 (1978); *Gueory v. District of Columbia*, App. D.C., 408 A.2d 967 (1979); *Ballard v. United States*, App. D.C., 430 A.2d 483 (1981); *In re L.M.*, App. D.C., 432 A.2d 692 (1981); *Martin v. Malhoyt*, 830 F.2d 237 (D.D.C. 1987); *In re E.D.P.*, App. D.C., 573 A.2d 1307 (1990); *United States v. Kennedy*, 118 WLR 873 (Super. Ct. 1990); *Rezvan v. District of Columbia*, App. D.C., 582 A.2d 937 (1990); *United States v. Bellamy*, App. D.C., 619 A.2d 515 (1993).

§ 22-1122. Rioting or inciting to riot.

(a) A riot in the District of Columbia is a public disturbance involving an assemblage of 5 or more persons which by tumultuous and violent conduct or the threat thereof creates grave danger of damage or injury to property or persons.

(b) Whoever willfully engages in a riot in the District of Columbia shall be punished by imprisonment for not more than 180 days or a fine of not more than \$1,000, or both.

(c) Whoever willfully incites or urges other persons to engage in a riot shall be punished by imprisonment for not more than 180 days or a fine of not more than \$1,000, or both.

(d) If in the course and as a result of a riot a person suffers serious bodily harm or there is property damage in excess of \$5,000, every person who willfully incited or urged others to engage in the riot shall be punished by imprisonment for not more than 10 years or a fine of not more than \$10,000, or both. (Dec. 27, 1967, 81 Stat. 742, Pub. L. 90-226, title IX, § 901; 1973 Ed., § 22-1122; Aug. 20, 1994, D.C. Law 10-151, § 111, 41 DCR 2608.)

Cross references. — As to disqualification from holding any position in District of Columbia government, for 5 years, after conviction of inciting riot or civil disorder, see 5 U.S.C. § 7313.

As to civil disorders, see 18 U.S.C. §§ 231-233.

As to riots, see 18 U.S.C. §§ 2101-2.

As to prohibition of defacement of public or private building or property, see § 22-3112.1.

As to prohibition of burning of cross or other religious symbol, see § 22-3112.2.

As to prohibition of wearing of masks for specified purposes, see § 22-3112.3.

As to penalties for violation of §§ 22-3112.1 to 22-3112.3, see § 22-3112.4.

Effect of amendments. — D.C. Law 10-151 substituted "180 days" for "1 year" in (b) and (c).

Temporary addition of sections. — D.C. Law 11-75 added 2 new sections to read as follows:

"§ 101. Definitions.

For the purposes of this title, the term:

(1) "Act" shall not include speech.

(2) "Health professional" means a person licensed to practice a health occupation in the District pursuant to § 2-3301.1.

(3) "Medical facility" means a facility, agency, or organizational entity, as defined in § 32-1301, licensed or otherwise authorized to provide health care services in the District.

(4) "Person" means:

(A) The chief medical officer of a medical facility or the chief medical officer's designee;

(B) The chief executive officer of a medical facility or the chief executive officer's designee;

(C) An agent of a medical facility; or

(D) A law enforcement officer in the performance of the enforcement officer's official duty."

"§ 102. Interference with entering and leaving a medical facility or home.

(a) A person shall not act alone or in concert with others with the intent to prevent another person from entering or leaving a medical facility. A person shall not detain a person or obstruct, impede, or hinder a person's free passage.

(b) A person shall not act alone or in concert with others with the intent to prevent a medical provider or a member of the medical provider's family from entering or leaving the medical provider's home.

(c) Subsections (a) and (b) of this section shall not be construed to prohibit any lawful picketing or assembly.

(d) Any person who violates either subsection (a) or (b) of this section, upon conviction, shall be fined not more than \$1,000, imprisoned for not more than 6 months, or both."

Section 301(b) of D.C. Law 11-75 provided that the act shall expire after 225 days of its having taken effect.

Emergency act amendments. — For temporary amendment of section, see § 111 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Interference with medical facilities and health professionals. — For temporary prohibition of a person interfering with the free access to or egress from a medical facility or the home of a health professional in the District of Columbia, see §§ 101 and 102 of the Interference with Medical Facilities and Health Professionals and Reestablishment of Health Services Planning and Certificate of Need Program Emergency Act of 1995 (D.C. Act 11-117, July

25, 1995, 42 DCR 4044) and §§ 2 and 3 of the Interference with Medical Facilities and Health Professionals Congressional Review Emergency Act of 1995 (D.C. Act 11-152, November 9, 1995, 42 DCR 6565).

Legislative history of Law 10-151. — See note to § 22-1101.

Legislative history of Law 11-75. — Law 11-75, the “Interference with Medical Facilities and Health Professionals and Reestablishment of Health Services Planning and Certificate of Need Program Temporary Act of 1995,” was introduced in Council and assigned Bill No. 11-374. The Bill was adopted on first and second readings on July 11, 1995, and July 29, 1995, respectively. Signed by the Mayor on August 11, 1995, it was assigned Act No. 11-136 and transmitted to both Houses of Congress for its review. D.C. Law 11-75 became effective on December 15, 1995.

This section is not unconstitutional as being unduly vague in its employment of words such as “public disturbance,” “tumultuous and violent conduct,” and “grave danger of damage or injury.” *United States v. Matthews*, 419 F.2d 1177 (D.C. Cir. 1969).

The word “engages” is not so vague as to make this section unconstitutional. *United States v. Jeffries*, 45 F.R.D. 110 (D.D.C. 1968).

A riot statute may limit speech under certain circumstances. *United States v. Jeffries*, 45 F.R.D. 110 (D.D.C. 1968).

“Riot” is breach of peace which causes public terror and which is committed by an unlawful assembly of the stated number of persons. *United States v. Bridgeman*, 523 F.2d

1099 (D.C. Cir. 1975), cert. denied, 425 U.S. 961, 96 S. Ct. 1744, 48 L. Ed. 2d 206 (1976).

“Breach of peace” defined. — It is a “breach of the peace” when acts or threats of violence cause consternation and alarm and thus disturb the tranquility of the citizens or of a community, threatening their security and invading the protection which the law affords to every citizen. *United States v. Bridgeman*, 523 F.2d 1099 (D.C. Cir. 1975), cert. denied, 425 U.S. 961, 96 S. Ct. 1744, 48 L. Ed. 2d 206 (1976).

Defendants need not have been acting in concert in order to be convicted of engaging in a riot and proof as to the conduct of each defendant is proof as to other 2. *United States v. Jeffries*, 45 F.R.D. 119 (D.D.C. 1968).

Section subsumes common law riots. — With the exception of the requirement that 5 persons participate, this section’s prohibition against riot or inciting to riot is intended to subsume all aspects of the common law crime. *United States v. Bridgeman*, 523 F.2d 1099 (D.C. Cir. 1975), cert. denied, 425 U.S. 961, 96 S. Ct. 1744, 48 L. Ed. 2d 206 (1976).

Actions in furtherance of riot. — Any person who, on encountering a riot, openly seizes goods he knows to have been looted or accessible to him only by virtue of disturbance will be deemed to have aided, encouraged and furthered the riot and, by so doing, to have engaged in it within meaning of this section. *United States v. Matthews*, 419 F.2d 1177 (D.C. Cir. 1969).

Cited in *United States v. Schiller*, App. D.C., 424 A.2d 51 (1980), cert. denied, 451 U.S. 964, 101 S. Ct. 2035, 68 L. Ed. 2d 341 (1981).

CHAPTER 12. EMBEZZLEMENT.

Sec.

22-1201 to 22-1211. [Repealed].

§§ 22-1201 to 22-1211. Embezzlement of property of District; embezzlement by agent, attorney, clerk, servant, or agent of a corporation; embezzlement of note not delivered; receiving embezzled property; embezzlement by carriers and innkeepers; embezzlement by warehouseman, factor, storage, forwarding, or commission merchant; violations of §§ 22-1202 to 22-1206 where value of property less than \$100; conversion by commission merchant, consignee, person selling goods on commission, and auctioneers; embezzlement by mortgagor of personal property in possession; embezzlement by executors and other fiduciaries; taking property without right.

Repealed. Dec. 1, 1982, D.C. Law 4-164, § 602(e)-(o), 29 DCR 3976.

Cross references. — As to inclusion of conduct previously known as embezzlement in offense of theft, see § 22-3811.

Legislative history of Law 4-164. — Law 4-164, the "District of Columbia Theft and White Collar Crimes Act of 1982," was introduced in Council and assigned Bill No. 4-133,

which was adopted on first, amended first and second readings on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.

CHAPTER 13. FALSE PRETENSES; FALSE PERSONATION.

Sec.

22-1301. [Repealed].

22-1302. Recordation of deed, contract, or conveyance with intent to extort money.

22-1303. False personation before court, officers, notaries.

Sec.

22-1304. Falsely impersonating public officer or minister.

22-1305. False personation of inspector of departments of District.

22-1306. False personation of police officer.

22-1307, 22-1308. [Repealed].

§ 22-1301. False pretenses.

Repealed. Dec. 1, 1982, D.C. Law 4-164, § 602(p), 29 DCR 3976.

Cross references. — As to inclusion of conduct previously known as false pretenses in offense of theft, see § 22-3811.

Legislative history of Law 4-164. — Law 4-164, the "District of Columbia Theft and White Collar Crimes Act of 1982," was introduced in Council and assigned Bill No. 4-133,

which was referred to the Committee on the Judiciary. The Bill was adopted on first, amended first and second readings on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.

§ 22-1302. Recordation of deed, contract, or conveyance with intent to extort money.

Whoever having no title or color of title to the land affected shall maliciously cause to be recorded in the office of the Recorder of Deeds of the District of Columbia any deed, contract, or other instrument purporting to convey or to relate to any land in said District with intent to extort money or anything of value from any person owning such land, or having any interest therein, shall be fined not less than \$1,000 or imprisoned not more than 180 days, or both. (June 30, 1902, 32 Stat. 535, ch. 1329, § 845a; 1973 Ed., § 22-1302; Aug. 20, 1994, D.C. Law 10-151, § 106, 41 DCR 2608.)

Cross references. — As to extortion, see § 22-3851.

Effect of amendments. — D.C. Law 10-151 substituted "\$1,000" for "\$500" and substituted "180 days" for "2 years."

Emergency act amendments. — For temporary amendment of section, see § 106 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — Law 10-151, the "Omnibus Criminal Justice Reform

Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

§ 22-1303. False personation before court, officers, notaries.

Whoever falsely personates another person before any court of record or judge thereof, or clerk of court, or any officer in the District authorized to administer oaths or take the acknowledgment of deeds or other instruments or to grant marriage licenses, with intent to defraud, shall be imprisoned for not

less than 1 year nor more than 5 years. (Mar. 3, 1901, 31 Stat. 1330, ch. 854, § 859; Feb. 17, 1909, 35 Stat. 623, ch. 134; 1973 Ed., § 22-1303.)

Cited in *Jones v. United States*, App. D.C., 243 A.2d 679 (1968).

§ 22-1304. Falsely impersonating public officer or minister.

Whoever falsely represents himself or herself to be a judge of the Superior Court of the District of Columbia, notary public, police officer, or other public officer, or a minister qualified to celebrate marriage, and attempts to perform the duty or exercise the authority pertaining to any such office or character, or having been duly appointed to any of such offices shall knowingly attempt to act as any such officers after his or her appointment or commission has expired or he or she has been dismissed from such office, shall suffer imprisonment in the penitentiary for not less than 1 year nor more than 3 years. (Mar. 3, 1901, 31 Stat. 1330, ch. 854, § 860; Feb. 17, 1909, 35 Stat. 623, ch. 134; July 8, 1963, 77 Stat. 77, Pub. L. 88-60, § 1; July 29, 1970, 84 Stat. 570, Pub. L. 91-358, title I, § 155(a); 1973 Ed., § 22-1304; May 21, 1994, D.C. Law 10-119, § 2(h), 41 DCR 1639; _____, 1996, D.C. Law 11- (Act 11-198), § 2, 43 DCR 528.)

Effect of amendments. — D.C. Law 10-119 inserted “or herself,” “or her,” and “or she.”

D.C. Law 11- (Act 11-198) validated a previously made change.

Legislative history of Law 10-119. — Law 10-119, the “Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Legislative history of Law 11- (Act 11-198). — Law 11- (Act 11-198), the “Criminal Code Technical Amendments Act of 1996,” was introduced in Council and assigned Bill No. 11-484, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on December 5, 1995, and January 4, 1996, respectively. Signed by the Mayor on January 26, 1996, it was assigned Act No. 11-198 and transmitted to both Houses of Congress for its review. D.C. Law 11- (Act 11-198) is projected to become Law on May 16, 1996.

Purpose of section. — This section, penalizing the false representation of a person as a police officer of the District of Columbia, is a protection of the citizenry against the exercise of excess jurisdiction by an impostor, as well as an impersonation in the genuine jurisdiction which might have been exercised by a legitimate officer. *Taylor v. United States*, 167 F.2d 752 (D.C. Cir. 1948).

Reliance is not element of statutory offense of false personation, and prosecution need not establish that parties to whom the alleged false representation was made relied upon it. *Levine v. United States*, 261 F.2d 747 (D.C. Cir. 1958).

Evidence sufficient to sustain conviction for false impersonation of police officer of the United States, notwithstanding government failed to offer direct proof that defendant was not such officer by reference to official police rolls. *Taylor v. United States*, 167 F.2d 752 (D.C. Cir. 1948).

Evidence sufficient to sustain conviction for false impersonation of notary public. — See *Fentress v. United States*, 228 F.2d 646 (D.C. Cir. 1955).

Cited in *Dyer v. United States*, 379 F.2d 89 (D.C. Cir. 1967); *Williams v. United States*, App. D.C., 404 A.2d 189 (1979).

§ 22-1305. False personation of inspector of departments of District.

It shall be unlawful for any person in the District of Columbia to falsely represent himself or herself as being an inspector of the Department of Human Services of said District, or an inspector of any department of the District government; and any person so offending shall be deemed guilty of a misdemeanor, and on conviction in the Superior Court of the District of Columbia shall be punished by a fine of not less than \$10 nor more than \$50 for the 1st offense, and for each subsequent offense by a fine of not less than \$50 nor more than \$100, or imprisonment in the Jail of the District not exceeding 6 months, or both, in the discretion of the court. (Mar. 2, 1897, 29 Stat. 619, ch. 364; Apr. 1, 1942, 56 Stat. 190, ch. 207, § 1; July 8, 1963, 77 Stat. 77, Pub. L. 88-60, § 1; July 29, 1970, 84 Stat. 570, Pub. L. 91-358, title I, § 155(a); 1973 Ed., § 22-1305.)

§ 22-1306. False personation of police officer.

It shall be a misdemeanor, punishable by imprisonment in the District jail or penitentiary not exceeding 180 days, or by a fine not exceeding \$1,000, for any person, not a member of the police force, to falsely represent himself as being such member, with a fraudulent design. (R.S., D.C., § 433; 1973 Ed., § 22-1306; Aug. 20, 1994, D.C. Law 10-151, § 114, 41 DCR 2608.)

Effect of amendments. — D.C. Law 10-151 substituted “180 days” for “2 years” and substituted “\$1,000” for “\$500.”

Emergency act amendments. — For temporary amendment of section, see § 114 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — See note to § 22-1302.

Uniform requirements for security officers

ers amended. — Section 2 of D.C. Law 5-180 amended § 4.2 of the Regulation Establishing Standards For Certification And Employment For Security Officers, enacted December 1, 1974 (Reg. 74-31; 17 DCMR 2112.1), to remove the prohibition against security officers wearing uniforms with stripes.

Cited in Wheeler v. United States, 190 F.2d 663 (D.C. Cir. 1951); Williams v. United States, App. D.C., 404 A.2d 189 (1979).

§§ 22-1307, 22-1308. Wearing or using insignia of certain organizations; false certificate of acknowledgment.

Repealed. Dec. 1, 1982, D.C. Law 4-164, § 602(q), (r), 29 DCR 3976.

Legislative history of Law 4-164. — See note to § 22-1301.

CHAPTER 14. FORGERY; FRAUDS.

Sec.	Sec.
22-1401. [Repealed].	
22-1402. Forging or imitating brands or packaging of goods.	draft, or order with intent to defraud; proof of intent; "credit" defined.
22-1403. [Repealed].	22-1411. Fraudulent advertising.
22-1404, 22-1405. [Repealed].	22-1412. Prosecution under § 22-1411.
22-1406. [Repealed].	22-1413. Penalty under § 22-1411.
22-1407 to 22-1409. [Repealed].	22-1414. Fraudulent interference or collusion in jury selection.
22-1410. Making, drawing, or uttering check,	

§ 22-1401. Forgery.

Repealed. Dec. 1, 1982, D.C. Law 4-164, § 602(s), 29 DCR 3976.

Cross references. — As to forgery, see subchapter V of Chapter 38 of this title.

Legislative history of Law 4-164. — Law 4-164, the "District of Columbia Theft and White Collar Crimes Act," was introduced in Council and assigned Bill No. 4-133, which was referred to the Committee on the Judiciary. The

Bill was adopted on first, amended first and second readings on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.

§ 22-1402. Forging or imitating brands or packaging of goods.

Whoever wilfully forges, or counterfeits, or makes use of any imitation calculated to deceive the public, though with colorable difference or deviation therefrom, of the private brand, wrapper, label, trademark, bottle, or package usually affixed or used by any person to or with the goods, wares, merchandise, preparation, or mixture of such person, with intent to pass off any work, goods, manufacture, compound, preparation, or mixture as the manufacture or production of such person which is not really such, shall be fined not more than \$500 or imprisoned not more than 180 days, or both. (Mar. 3, 1901, 31 Stat. 1333, ch. 854, § 879; 1973 Ed., § 22-1402; Aug. 20, 1994, D.C. Law 10-151, § 105(e), 41 DCR 2608.)

Cross references. — As to fraud, see § 22-3821.

As to penalty for violations for registration of containers of milk and beverages composed principally of milk, see §§ 48-210 and 48-303.

As to penalty for violations of registration of labor union labels, see § 48-403.

Effect of amendments. — D.C. Law 10-151 substituted "180 days" for "1 year."

Emergency act amendments. — For temporary amendment of section, see § 105(e) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — Law 10-151, the "Omnibus Criminal Justice Reform Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

§ 22-1403. Stealing, destroying, mutilating, secreting, or withholding will.

Repealed. Sept. 14, 1965, 79 Stat. 783, Pub. L. 89-183, § 8.

§§ 22-1404, 22-1405. Decedent's estate — Secreting or converting property, documents, or assets; taking away or concealing writings.

Repealed. Dec 1, 1982, D.C. Law 4-164, § 602(t), (u), 29 DCR 3976.

Cross references. — As to theft and fraud, see Chapter 38 of this title. **Legislative history of Law 4-164.** — See note to § 22-1401.

§ 22-1406. Sale or concealment by conditional vendee, with intent to defraud.

Repealed. Dec. 30, 1963, 77 Stat. 774, Pub. L. 88-243, § 15(a)(1).

§§ 22-1407 to 22-1409. Fraud by use of slugs to operate coin-controlled mechanism; manufacture, sale, offer for sale, possession of slugs or device to operate coin-controlled mechanism; "person" defined.

Repealed. Dec. 1, 1982, D.C. Law 4-164, § 602(v)-(x), 29 DCR 3976.

Cross references. — As to theft and fraud, see Chapter 38 of this title. **Legislative history of Law 4-164.** — See note to § 22-1401.

§ 22-1410. Making, drawing, or uttering check, draft, or order with intent to defraud; proof of intent; "credit" defined.

Any person within the District of Columbia who, with intent to defraud, shall make, draw, utter, or deliver any check, draft, order, or other instrument for the payment of money upon any bank or other depository, knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, order, or other instrument in full upon its presentation, shall, if the amount of such check, draft, order, or other instrument is \$100 or more, be guilty of a felony and fined not more than \$3,000 or imprisoned for not less than 1 year nor more than 3 years, or both; or if the amount of such check, draft, order, or other instrument is less than \$100, be guilty of a misdemeanor and fined not more than \$1,000 or imprisoned not more than 180 days, or both. As against the maker or drawer thereof the making, drawing, uttering, or delivering by such maker or drawer of a check, draft, order, or other instrument, payment of which is refused by the drawee because of insufficient funds of the maker or drawer in its possession or control,

shall be prima facie evidence of the intent to defraud and of knowledge of insufficient funds in or credit with such bank or other depository, provided such maker or drawer shall not have paid the holder thereof the amount due thereon, together with the amount of protest fees, if any, within 5 days after receiving notice in person, or writing, that such check, draft, order, or other instrument has not been paid. The word "credit," as used herein, shall be construed to mean arrangement or understanding, express or implied, with the bank or other depository for the payment of such check, draft, order, or other instrument. (July 1, 1922, 42 Stat. 820, ch. 273; Oct. 22, 1970, 84 Stat. 1094, Pub. L. 91-497, § 3; 1973 Ed., § 22-1410; Aug. 20, 1994, D.C. Law 10-151, § 108, 41 DCR 2608.)

Cross references. — As to theft, see § 22-3811.

As to fraud, see § 22-3821.

As to allegation and proof of intent to defraud, see § 23-322.

Effect of amendments. — D.C. Law 10-151 substituted "180 days" for "1 year" in the first sentence.

Emergency act amendments. — For temporary amendment of section, see § 108 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — See note to § 22-1402.

Fact that check is issued for past-due obligation does not preclude conviction under this section. *Clarke v. United States*, App. D.C., 140 A.2d 181 (1958), *aff'd*, 263 F.2d 269 (D.C. Cir. 1959).

False representation, knowledge of falsity and intent to defraud are sufficient to violate bad check statute when representation

involves worthless check. *Ciullo v. United States*, 325 F.2d 227 (D.C. Cir. 1963).

Question of fraudulent intent for jury. —

In a prosecution for violation of this section, making it a crime for any person, with an intent to deceive, to deliver any check while knowing that there are insufficient funds to his credit with bank for payment of such check, question of whether or not the defendant had an intent to defraud in the issuance of a check for past consideration presented a question of fact for the jury. *Clarke v. United States*, 263 F.2d 269 (D.C. Cir. 1959).

Cited in *McGuinness v. United States*, App. D.C., 77 A.2d 22 (1950); *Sade v. National Sur. Corp.*, 203 F. Supp. 680 (D.D.C. 1962), *aff'd*, 314 F.2d 286 (D.C. Cir. 1963); *Locks v. United States*, App. D.C., 388 A.2d 873 (1978); *Johnson v. United States*, App. D.C., 389 A.2d 1353 (1978); *Valentine v. United States*, App. D.C., 394 A.2d 1374 (1978); *Srouf v. Barnes*, 670 F. Supp. 18 (D.D.C. 1987).

§ 22-1411. Fraudulent advertising.

It shall be unlawful in the District of Columbia for any person, firm, association, corporation, or advertising agency, either directly or indirectly, to display or exhibit to the public in any manner whatever, whether by handbill, placard, poster, picture, film, or otherwise; or to insert or cause to be inserted in any newspaper, magazine, or other publication printed in the District of Columbia; or to issue, exhibit, or in any way distribute or disseminate to the public; or to deliver, exhibit, mail, or send to any person, firm, association, or corporation any false, untrue, or misleading statement, representation, or advertisement with intent to sell, barter, or exchange any goods, wares, or merchandise or anything of value or to deceive, mislead, or induce any person, firm, association, or corporation to purchase, discount, or in any way invest in or accept as collateral security any bonds, bill, share of stock, note, warehouse receipt, or any security; or with the purpose to deceive, mislead, or induce any person, firm, association, or corporation to purchase, make any loan upon or invest in any property of any kind; or use any of the aforesaid methods with the intent or purpose to deceive, mislead, or induce any other person, firm, or

corporation for a valuable consideration to employ the services of any person, firm, association, or corporation so advertising such services. (May 29, 1916, 39 Stat. 165, ch. 130, § 1; 1973 Ed., § 22-1411.)

Cross references. — As to fraud, see § 22-3821.

As to allegation and proof of intent to defraud, see § 23-322.

Section references. — This section is referred to in §§ 10-126, 22-1412 and 22-1413.

Course of conduct and each publication punishable. — This section, making unlawful

the publication of false advertising, does not punish only a course of conduct but punishes each publication of a false advertisement. *Green v. United States*, App. D.C., 312 A.2d 788 (1973), cert. denied, 419 U.S. 827, 95 S. Ct. 45, 42 L. Ed. 2d 51 (1974).

Cited in *Robles v. United States*, App. D.C., 115 A.2d 303 (1955).

§ 22-1412. Prosecution under § 22-1411.

Prosecution under § 22-1411 shall be in the Superior Court of the District of Columbia upon information filed by the United States Attorney for the District of Columbia or an Assistant U.S. Attorney. (May 29, 1916, 39 Stat. 165, ch. 130, § 2; Apr. 1, 1942, 56 Stat. 190, ch. 207, § 1; June 25, 1948, 62 Stat. 909, ch. 646, § 1; July 8, 1963, 77 Stat. 77, Pub. L. 88-60, § 1; July 29, 1970, 84 Stat. 570, Pub. L. 91-358, title I, § 155(a); 1973 Ed., § 22-1412; May 21, 1994, D.C. Law 10-119, § 10, 41 DCR 1639.)

Section references. — This section is referred to in § 10-126.

Effect of amendments. — D.C. Law 10-119 substituted “an Assistant U.S. Attorney” for “one of his assistants.”

Legislative history of Law 10-119. — Law 10-119, the “Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-332, which was referred to the

Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Cited in *Green v. United States*, App. D.C., 312 A.2d 788 (1973), cert. denied, 419 U.S. 827, 95 S. Ct. 45, 42 L. Ed. 2d 51 (1974).

§ 22-1413. Penalty under § 22-1411.

Any person, firm, or association violating any of the provisions of § 22-1411 shall upon conviction thereof, be punished by a fine of not more than \$500 or by imprisonment of not more than 60 days, or by both fine and imprisonment, in the discretion of the court. A corporation convicted of an offense under the provisions of § 22-1411 shall be fined not more than \$500, and its president or such other officials as may be responsible for the conduct and management thereof shall be imprisoned not more than 60 days, in the discretion of the court. (May 29, 1916, 39 Stat. 165, ch. 130, § 3; 1973 Ed., § 22-1413.)

Section references. — This section is referred to in § 10-126.

Cited in *Green v. United States*, App. D.C.,

312 A.2d 788 (1973), cert. denied, 419 U.S. 827, 95 S. Ct. 45, 42 L. Ed. 2d 51 (1974).

§ 22-1414. Fraudulent interference or collusion in jury selection.

If any person shall fraudulently tamper with any box or wheel used or intended by the jury commission for the names of prospective jurors, or of

prospective condemnation jurors or commissioners, or shall fraudulently tamper with the contents of any such box or wheel, or with any jury list, or be guilty of any fraud or collusion with respect to the drawing of jurors or condemnation jurors or commissioners, or if any jury commissioner shall put in or leave out of any such box or wheel the name of any person at the request of such person, or at the request of any other person, or if any jury commissioner shall wilfully draw from any such box or wheel a greater number of names than is required by the court, any such person or jury commissioner so offending shall for each offense be punished by a fine of not more than \$1,000 or imprisonment for not more than 180 days, or both. (Mar. 3, 1901, 31 Stat. 1223, ch. 854, § 213; Apr. 19, 1920, 41 Stat. 560, ch. 153, § 213; Mar. 27, 1968, 82 Stat. 63, Pub. L. 90-274, § 103(f); 1973 Ed., § 22-1414; Aug. 20, 1994, D.C. Law 10-151, § 105(f), 41 DCR 2608.)

Cross references. — As to allegation and proof of intent to defraud, see § 23-322.

Effect of amendments. — D.C. Law 10-151 substituted “\$1,000 or imprisonment for not more than 180 days” for “\$500 or imprisonment in the District Jail or Workhouse for not more than 1 year” near the end.

Emergency act amendments. — For temporary amendment of section, see § 105(f) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — See note to § 22-1402.

CHAPTER 15. GAMBLING.

Subchapter I. General Provisions.

Sec.	Sec.
22-1501. Lotteries; promotion; sale or possession of tickets.	22-1510. Penalty for bucketing or keeping bucket-shop.
22-1502. Possession of lottery or policy tickets.	22-1511. Penalty for communicating, receiving, exhibiting, or displaying quotations of prices.
22-1503. Permitting sale of lottery tickets on premises.	22-1512. Bucketing; written statement to be furnished; contents.
22-1504. Gaming; setting up gaming table; inducing play.	22-1513. Corrupt influence in connection with athletic contests.
22-1505. Gambling premises; definition; prohibition against maintaining; forfeiture; liens; deposit of moneys in Treasury; penalty; subsequent offenses.	22-1514. Immunity of witnesses; record.
22-1506. Three-card monte and confidence games.	22-1515. [Repealed].
22-1507. "Gaming table" defined.	
22-1508. Gambling pools and bookmaking; athletic contest defined.	
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Subchapter II. Legalization.

22-1516. Statement of purpose.
22-1517. Permissible gambling activities.
22-1518. Advertising and promotion; sale and possession of lottery and numbers tickets and slips.

Subchapter I. General Provisions.

§ 22-1501. Lotteries; promotion; sale or possession of tickets.

If any person shall within the District keep, set up, or promote, or be concerned as owner, agent, or clerk, or in any other manner, in managing, carrying on, promoting, or advertising, directly or indirectly, any policy lottery, policy shop, or any lottery, or shall sell or transfer any chance, right, or interest, tangible or intangible, in any policy lottery, or any lottery or shall sell or transfer any ticket, certificate, bill, token, or other device, purporting or intended to guarantee or assure to any person or entitle him or her to a chance of drawing or obtaining a prize to be drawn in any lottery, or in a game or device commonly known as policy lottery or policy or shall sell or transfer, or have in his or her possession for the purpose of sale or transfer, a chance or ticket in or share of a ticket in any lottery or any such bill, certificate, token, or other device, he or she shall be fined upon conviction of each said offense not more than \$1,000 or be imprisoned not more than 3 years, or both. The possession of any copy or record of any such chance, right, or interest, or of any such ticket, certificate, bill, token, or other device shall be prima facie evidence that the possessor of such copy or record did, at the time and place of such possession, keep, set up, or promote, or was at such time and place concerned as owner, agent, or clerk, or otherwise in managing, carrying on, promoting, or advertising a policy lottery, policy shop, or lottery. (Mar. 3, 1901, 31 Stat. 1330, ch. 854, § 863; June 30, 1902, 32 Stat. 535, ch. 1329; Apr. 5, 1938, 52 Stat. 198, ch. 72, § 1; 1973 Ed., § 22-1501; May 21, 1994, D.C. Law 10-119, § 2(i), 41 DCR 1639.)

Cross references. — As to other criminal penalties for gambling, see § 16-1704.

As to search warrants, see § 23-521 et seq.

As to transfer or suspension of liquor license pending prosecution, see §§ 25-117 and 25-118.

Section references. — This section is referred to in §§ 22-1502, 22-1505 and 23-546.

Effect of amendments. — D.C. Law 10-119, in the first sentence, inserted "or she," inserted "or her" twice, and deleted "for himself or another person" following "or policy or shall."

Legislative history of Law 10-119. — Law 10-119, the "Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Intended scope of section. — This section, penalizing anyone setting up in the District of Columbia any "gaming table", etc., or who permits any person to bet or play at or upon any such gaming table or device, etc., indicates a physical device of some sort and does not mean the mere taking of a bet on a race. *Plummer v. United States*, 189 F.2d 19 (D.C. Cir. 1951).

One of essential elements of lottery is awarding of prize by chance, but the exact method adopted for the application of chance to the distribution of prizes is immaterial. *Forte v. United States*, 83 F.2d 612 (D.C. Cir. 1936).

"Numbers game" is lottery when the player merely guesses that the result of mathematical calculations, based upon the prices paid at a certain track, will be a certain number. *Forte v. United States*, 83 F.2d 612 (D.C. Cir. 1936).

Ban of all records used in lottery operations intended. — The intention of statutes proscribing the knowing possession of certain items used or to be used in lotteries and other forms of gambling was to ban not only knowing possession of lottery tickets and similar writings but also knowing possession of any records used or to be used in violating the provisions of the law relating to lotteries and other forms of gambling. *Bailey v. United States*, App. D.C., 223 A.2d 190 (1966).

Thus, possession of "cut cards" violative of section. — Defendants in possession of "cut cards," which are listings of number combinations which "hit" more frequently than others and on which odds are somewhat reduced from normal, violate this section. *Bailey v. United States*, App. D.C., 223 A.2d 190 (1966).

Used numbers slips also prima facie evidence of lottery. — A defendant's possession of used numbers slips, known in the game as

"dead" slips, constitutes prima facie evidence of carrying on a lottery. *Clement v. United States*, 208 F.2d 46 (D.C. Cir. 1953); *United States v. Lewis*, 171 F. Supp. 71 (D.D.C.), modified on other grounds, *Davis v. United States*, 274 F.2d 585 (D.C. Cir. 1959), cert. denied, 363 U.S. 806, 80 S. Ct. 1241, 4 L. Ed. 2d 1149 (1960).

Whether lottery slips seized under a search warrant were dead or alive they could be introduced in support of charge of operating a lottery. *Shaw v. United States*, 209 F.2d 298 (D.C. Cir. 1953), cert. denied, 347 U.S. 905, 74 S. Ct. 430, 98 L. Ed. 1063 (1954).

In a prosecution for operating a lottery and for possession of numbers slips, wherein the jury had been fully instructed as to the government's burden of proof, the trial judge's answer to the jury's question, whether possession of the slips constituted prima facie evidence of the operation of a lottery, given in the words of this section, providing that such possession did constitute prima facie evidence, without explaining meaning of prima facie evidence, was appropriate and understandable within the framework of the entire charge. *Maynard v. United States*, 215 F.2d 336 (D.C. Cir. 1954).

And presumption arises with strong circumstantial evidence. — The statutory presumption of promoting a lottery, which arises from evidence of possession of lottery tickets, may be properly invoked upon circumstantial evidence of possession of such tickets, provided such circumstantial evidence is strong. *Davis v. United States*, 274 F.2d 585 (D.C. Cir. 1959), cert. denied, 363 U.S. 806, 80 S. Ct. 1241, 4 L. Ed. 2d 1149 (1960).

But proof of possession of numbers slips is not essential to a conviction for operating a lottery. *United States v. Lewis*, 171 F. Supp. 71 (D.D.C.), modified on other grounds, *Davis v. United States*, 274 F.2d 585 (D.C. Cir. 1959), cert. denied, 363 U.S. 806, 80 S. Ct. 1241, 4 L. Ed. 2d 1149 (1960).

Each sale of lottery ticket is separate offense. — Six sales of lottery tickets on different dates to the same person are 6 violations of this section. *United States v. Long*, 169 F. Supp. 730 (D.D.C. 1959).

Crime of conspiracy deemed separate and chargeable offense. — The crime of conspiracy to violate lottery laws and lottery statute violations are not so closely connected as to render applicable a proposition that where a concert of action between 2 or more persons is logically necessary to a crime's completion, a charge of conspiracy will not lie against such persons. *Woods v. United States*, 240 F.2d 37 (D.C. Cir. 1956), cert. denied, 353 U.S. 941, 77 S. Ct. 815, 1 L. Ed. 2d 760, cert. denied, 354 U.S. 926, 77 S. Ct. 1385, 1 L. Ed. 2d 1438 (1957).

Revocation of driver's license not appropriate penalty. — Revocation of a defendant's

operator's permit for operating motor vehicle in conducting lottery and while possessing numbers slips was an abuse of discretion, where there was no evidence of any threat or danger to the safety of persons or property through the defendant's use of an automobile. *Stoneburner v. England*, App. D.C., 202 A.2d 652 (1964).

Evidence sufficient to sustain conviction for violation of lottery law. — See *Smith v. United States*, 112 F.2d 217 (D.C. Cir.), cert. denied, 311 U.S. 663, 61 S. Ct. 20, 85 L. Ed. 425 (1940); *Kenney v. United States*, 157 F.2d 442 (D.C. Cir. 1946); *Aikens v. United States*, 232 F.2d 66 (D.C. Cir. 1956); *Ellis v. United States*, 270 F.2d 448 (D.C. Cir.), cert. denied, 361 U.S. 916, 80 S. Ct. 260, 4 L. Ed. 2d 185 (1959); *Davis v. United States*, 274 F.2d 585 (D.C. Cir. 1959), cert. denied, 363 U.S. 806, 80 S. Ct. 1241, 4 L. Ed. 2d 1149 (1960); *United States v. Loundmannz*, 472 F.2d 1376 (D.C. Cir. 1972), cert. denied, 410 U.S. 957, 93 S. Ct. 1431, 35 L. Ed. 2d 691 (1973).

Cited in United States v. Plisco, 22 F. Supp. 242 (D.D.C. 1938); *Shettel v. United States*, 113 F.2d 34 (D.C. Cir. 1940); *Coupe v. United States*, 113 F.2d 145 (D.C. Cir.), cert. denied, 310 U.S. 651, 60 S. Ct. 1105, 84 L. Ed. 1417 (1940); *McDonald v. United States*, 335 U.S. 451, 69 S. Ct. 191, 93 L. Ed. 153 (1948); *Newyahr v. United States*, 177 F.2d 658 (D.C. Cir. 1949), cert. denied, 338 U.S. 936, 70 S. Ct. 350, 94 L. Ed. 577 (1950); *Accarino v. United States*, 179 F.2d 456 (D.C. Cir. 1949); *Billeci v. United States*, 184 F.2d 394 (D.C. Cir. 1950); *Wyche v. United States*, 193 F.2d 703 (D.C. Cir. 1951), cert. denied, 342 U.S. 943, 72 S. Ct. 556, 96 L. Ed. 702 (1952); *Mills v. United States*, 196 F.2d 600 (D.C. Cir.), cert. denied, 344 U.S. 926, 73 S. Ct. 27, 97 L. Ed. 643 (1952); *Harvey v. United States*, 197 F.2d 594 (D.C. Cir. 1952); *De Bruhl v. United States*, 199 F.2d 175 (D.C. Cir.), cert. denied, 344 U.S. 868, 73 S. Ct. 111, 97 L. Ed. 673 (1952); *Washington v. United States*,

202 F.2d 214 (D.C. Cir.), cert. denied, 345 U.S. 956, 73 S. Ct. 938, 97 L. Ed. 1377 (1953); *Fisher v. United States*, 205 F.2d 702 (D.C. Cir.), cert. denied, 346 U.S. 872, 74 S. Ct. 122, 98 L. Ed. 381 (1953); *Simmons v. United States*, 206 F.2d 427 (D.C. Cir. 1953); *Nelson v. United States*, 208 F.2d 505 (D.C. Cir.), cert. denied, 346 U.S. 827, 74 S. Ct. 48, 98 L. Ed. 352 (1953); *United States v. Johnson*, 113 F. Supp. 359 (D.D.C. 1953); *Ingram v. United States*, 209 F.2d 818 (D.C. Cir. 1954); *United States v. Bell*, 126 F. Supp. 612 (D.D.C.), motion for reconsideration denied, 17 F.R.D. 13 (D.D.C. 1955), aff'd, 240 F.2d 37 (1957); *Carroll v. United States*, 354 U.S. 394, 77 S. Ct. 1332, 1 L. Ed. 2d 1442 (1957); *Taylor v. United States*, 260 F.2d 737 (D.C. Cir. 1958); *Lewis v. United States*, 263 F.2d 265 (D.C. Cir. 1958), cert. denied, 359 U.S. 959, 79 S. Ct. 793, 3 L. Ed. 2d 766 (1959); *United States v. Haje*, 159 F. Supp. 870 (D.D.C. 1958); *Stephens v. United States*, 271 F.2d 832 (D.C. Cir. 1959); *Carter v. United States*, 281 F.2d 640 (D.C. Cir.), cert. denied, 364 U.S. 880, 81 S. Ct. 168, 5 L. Ed. 2d 102 (1960); *Minovitz v. United States*, 298 F.2d 682 (D.C. Cir. 1962); *Washington v. United States*, 401 F.2d 915 (D.C. Cir. 1968); \$1,407.00 in *United States Currency v. District of Columbia*, App. D.C., 242 A.2d 217 (1968); \$3,265.28 in *United States Currency v. District of Columbia*, App. D.C., 249 A.2d 516 (1969); *United States v. Berry*, 463 F.2d 1278 (D.C. Cir. 1972); *United States v. Myles*, 430 F. Supp. 98 (D.D.C. 1977), aff'd, 569 F.2d 161 (D.C. Cir. 1978); *United States v. Williams*, 580 F.2d 578 (D.C. Cir.), cert. denied, 439 U.S. 832, 99 S. Ct. 112, 58 L. Ed. 2d 127 (1978); *Davis v. United States*, App. D.C., 385 A.2d 757 (1978); *McEachin v. United States*, App. D.C., 432 A.2d 1212 (1981); *Mack v. United States*, App. D.C., 464 A.2d 114 (1983); *Washington v. District of Columbia*, 685 F. Supp. 264 (D.D.C. 1988).

§ 22-1502. Possession of lottery or policy tickets.

If any person shall, within the District of Columbia, knowingly have in his or her possession or under his control, any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing, current or not current, used or to be used in violating the provisions of § 22-1501, 22-1504, or 22-1508, he or she shall, upon conviction of each such offense, be fined not more than \$1,000 or be imprisoned for not more than 180 days, or both. For the purpose of this section, possession of any record, notation, receipt, ticket, certificate, bill, slip, token, paper, or writing shall be presumed to be knowing possession thereof. (Mar. 3, 1901, ch. 854, § 863a; Apr. 5, 1938, 52 Stat. 198, ch. 72, § 2; June 29, 1953, 67 Stat. 95, ch. 159, § 206(a); 1973 Ed., § 22-1502; May 21, 1994, D.C. Law 10-119, § 2(j), 41 DCR 1639; Aug. 20, 1994, D.C. Law 10-151, § 105(g), 41 DCR 2608.)

Cross references. — As to search warrants, see § 23-521 et seq.

Effect of amendments. — D.C. Law 10-119, in the first sentence, inserted "or she" and inserted "or her" twice.

D.C. Law 10-151 substituted "180 days" for "1 year" in the first sentence.

Emergency act amendments. — For temporary amendment of section, see § 105(g) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-119. — See note to § 22-1501.

Legislative history of Law 10-151. — Law 10-151, the "Omnibus Criminal Justice Reform Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

This section is constitutional. *Ferguson v. United States*, App. D.C., 123 A.2d 615, aff'd, 239 F.2d 952 (D.C. Cir. 1956), cert. denied, 353 U.S. 985, 77 S. Ct. 1287, 1 L. Ed. 2d 1144 (1957).

Proof of consideration not necessary for possession charge. — Though consideration, together with chance and prize, is 1 of 3 elements necessary to constitute a lottery, it is unnecessary, in a prosecution for possession of numbers slips, to prove that consideration has passed for them. *Ferguson v. United States*, App. D.C., 123 A.2d 615, aff'd, 239 F.2d 952 (D.C. Cir. 1956), cert. denied, 353 U.S. 985, 77 S. Ct. 1287, 1 L. Ed. 2d 1144 (1957).

And not essential to put slips into evidence. — To prove the defendant's possession of numbers slips, it is not essential that the slips be received in evidence. *Harris v. United States*, App. D.C., 254 A.2d 726 (1969).

Ban of all records used in lottery operations intended. — The intention of statutes proscribing the knowing possession of certain items used or to be used in lotteries and other forms of gambling was to ban not only knowing possession of lottery tickets and similar writings but also knowing possession of any records used or to be used in violating the provisions of the law relating to lotteries and other forms of gambling. *Bailey v. United States*, App. D.C., 223 A.2d 190 (1966).

Thus, possession of "cut cards" violative of section. — Defendants in possession of "cut cards," which are listings of number combinations which "hit" more frequently than others and on which odds are somewhat reduced from

normal, violate this section. *Bailey v. United States*, App. D.C., 223 A.2d 190 (1966).

"Dead" slips. — The defendant's possession of used numbers slips, known in the game as "dead" slips, constitutes an offense under this section. *Clement v. United States*, 208 F.2d 46 (D.C. Cir. 1953).

Defendant's burden of proof that numbers slips not lottery slips. — Evidence that the defendant admitted ownership of a billfold containing a quantity of undated numbers slips was prima facie indicative that possession of such tickets was violative of this section and shifted the burden of going forward with the evidence to the defendant to prove that the numbers slips were not lottery slips within meaning of this section. *Roseborough v. United States*, App. D.C., 86 A.2d 920 (1952).

In a prosecution for operating a lottery and for possession of numbers slips, wherein the jury had been fully instructed as to the government's burden of proof, the trial judge's answer to the jury's question, whether possession of the slips constituted prima facie evidence of the operation of a lottery, given in words of this section providing that such possession did constitute prima facie evidence, without explaining the meaning of prima facie evidence, was appropriate and understandable within the framework of the entire charge. *Maynard v. United States*, 215 F.2d 336 (D.C. Cir. 1954).

Conspiracy deemed separate but chargeable offense. — The crime of conspiracy to violate lottery laws and violations of this section are not so closely connected as to render applicable a proposition that where a concert of action between 2 or more persons is logically necessary to a crime's completion, a charge of conspiracy will not lie against such persons. *Woods v. United States*, 240 F.2d 37 (D.C. Cir. 1956), cert. denied, 353 U.S. 941, 77 S. Ct. 815, 1 L. Ed. 2d 760, cert. denied, 354 U.S. 926, 77 S. Ct. 1385, 1 L. Ed. 2d 1438 (1957).

Evidence sufficient to sustain conviction for possession of lottery materials. — See *Kenney v. United States*, 157 F.2d 442 (D.C. Cir. 1946); *Ledbetter v. United States*, 211 F.2d 628 (D.C. Cir. 1953), cert. denied, 347 U.S. 977, 74 S. Ct. 789, 98 L. Ed. 1116 (1954); *Aikens v. United States*, 232 F.2d 66 (D.C. Cir. 1956); *Ferguson v. United States*, 239 F.2d 952 (D.C. Cir. 1956), cert. denied, 353 U.S. 985, 77 S. Ct. 1287, 1 L. Ed. 2d 1144 (1957); *Ellis v. United States*, 270 F.2d 448 (D.C. Cir.), cert. denied, 361 U.S. 916, 80 S. Ct. 260, 4 L. Ed. 2d 185 (1959); *Moody v. United States*, App. D.C., 163 A.2d 337 (1960); *Madre v. United States*, App. D.C., 173 A.2d 917 (1961); *Burrell v. United States*, App. D.C., 252 A.2d 897 (1969); *United States v. Loundmannz*, 472 F.2d 1376 (D.C. Cir. 1972), cert. denied, 410 U.S. 957, 93 S. Ct. 1431, 35 L. Ed. 2d 691 (1973).

Evidence insufficient to sustain conviction for knowing possession of lottery materials. — See *Fletcher v. United States*, App. D.C., 49 A.2d 88 (1946).

Cited in *Harris v. United States*, App. D.C., 32 A.2d 101 (1943); *McDonald v. United States*, 335 U.S. 451, 69 S. Ct. 191, 93 L. Ed. 153 (1948); *Accarino v. United States*, 179 F.2d 456 (D.C. Cir. 1949); *Wyche v. United States*, 193 F.2d 703 (D.C. Cir. 1951), cert. denied, 342 U.S. 943, 72 S. Ct. 556, 96 L. Ed. 702 (1952); *Mills v. United States*, 196 F.2d 600 (D.C. Cir.), cert. denied, 344 U.S. 926, 73 S. Ct. 27, 97 L. Ed. 643 (1952); *De Bruhl v. United States*, 199 F.2d 175 (D.C. Cir.), cert. denied, 344 U.S. 868, 73 S. Ct. 111, 97 L. Ed. 673 (1952); *Washington v. United States*, 202 F.2d 214 (D.C. Cir.), cert. denied, 345 U.S. 956, 73 S. Ct. 938, 97 L. Ed. 1377 (1953); *Fisher v. United States*, 205 F.2d 702 (D.C. Cir.), cert. denied, 346 U.S. 872, 74 S. Ct. 122, 98 L. Ed. 381 (1953); *United States v. Johnson*, 113 F. Supp. 359 (D.D.C. 1953); *Ingram v. United States*, 209 F.2d 818 (D.C. Cir. 1954); *Carroll v. United States*, 354 U.S. 394, 77 S. Ct. 1332, 1 L. Ed. 2d 1442 (1957); *Mathis v. United States*, App. D.C., 129 A.2d 178 (1957); *Taylor v. United States*, 260 F.2d 737 (D.C. Cir.

1958); *United States v. Haje*, 159 F. Supp. 870 (D.D.C. 1958); *Stephens v. United States*, 271 F.2d 832 (D.C. Cir. 1959); *Davis v. United States*, 274 F.2d 585 (D.C. Cir. 1959), cert. denied, 363 U.S. 806, 80 S. Ct. 1241, 4 L. Ed. 2d 1149 (1960); *United States v. Long*, 169 F. Supp. 730 (D.D.C. 1959); *Minovitz v. United States*, 298 F.2d 682 (D.C. Cir. 1962); *Freeman v. United States*, App. D.C., 201 A.2d 22 (1964); *\$1,407.00 in United States Currency v. District of Columbia*, App. D.C., 242 A.2d 217 (1968); *United States v. Dowling*, App. D.C., 271 A.2d 406 (1970); *United States v. Berry*, 463 F.2d 1278 (D.C. Cir. 1972); *Ray v. United States*, App. D.C., 288 A.2d 239 (1972); *United States v. Myles*, 430 F. Supp. 98 (D.D.C. 1977), aff'd, 569 F.2d 161 (D.C. Cir. 1978); *United States v. Williams*, 580 F.2d 578 (D.C. Cir.), cert. denied, 439 U.S. 832, 99 S. Ct. 112, 58 L. Ed. 2d 127 (1978); *Davis v. United States*, App. D.C., 385 A.2d 757 (1978); *Davis v. United States*, App. D.C., 390 A.2d 976 (1978); *Mack v. United States*, App. D.C., 464 A.2d 114 (1983); *Washington v. District of Columbia*, 685 F. Supp. 264 (D.D.C. 1988); *District of Columbia v. 313 M St.*, App. D.C., 633 A.2d 820 (1993).

§ 22-1503. Permitting sale of lottery tickets on premises.

If any person shall knowingly permit, on any premises under his or her control in the District, the sale of any chance or ticket in or share of a ticket in any lottery or policy lottery, or shall knowingly permit any lottery or policy lottery, or policy shop on such premises, he or she shall be fined not less than \$50 nor more than \$500, or be imprisoned not more than 180 days, or both. (Mar. 3, 1901, 31 Stat. 1330, ch. 854, § 864; 1973 Ed., § 22-1503; May 21, 1994, D.C. Law 10-119, § 2(k), 41 DCR 1639; Aug. 20, 1994, D.C. Law 10-151, § 105(h), 41 DCR 2608.)

Cross references. — As to search warrants, see § 23-521 et seq.

Effect of amendments. — D.C. Law 10-119 inserted "or her" and "or she."

D.C. Law 10-151 substituted "180 days" for "1 year."

Emergency act amendments. — For temporary amendment of section, see § 105(h) of

the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-119. — See note to § 22-1501.

Legislative history of Law 10-151. — See note to § 22-1502.

§ 22-1504. Gaming; setting up gaming table; inducing play.

Whoever shall in the District set up or keep any gaming table, or any house, vessel, or place, on land or water, for the purpose of gaming, or gambling device commonly called A B C, faro bank, E O, roulette, equality, keno, thimbles, or little joker, or any kind of gaming table or gambling device adapted, devised, and designed for the purpose of playing any game of chance for money or property, or shall induce, entice, and permit any person to bet or play at or upon any such gaming table or gambling device, or on the side of or against the

keeper thereof, shall be punished by imprisonment for a term of not more than 5 years. For the purposes of this section, the term "gambling device" shall not include slot machines manufactured before 1952, intended for exhibition or private use by the owner, and not used for gambling purposes. The term "slot machine" means a mechanical device, an essential part of which is a drum or reel which bears an insignia and which when operated may deliver, as a result of the application of an element of chance, a token, money, or property, or by operation of which a person may become entitled to receive, as a result of this application of an element of chance, a token, money, or property. (Mar. 3, 1901, 31 Stat. 1331, ch. 854, § 865; 1973 Ed., § 22-1504; Jan. 26, 1982, D.C. Law 4-59, § 2, 28 DCR 4766.)

Cross references. — As to search warrants, see § 23-521 et seq.

Section references. — This section is referred to in §§ 22-1502, 22-1505 and 22-1507.

Legislative history of Law 4-59. — Law 4-59, the "Antique Slot Machine Act of 1981," was introduced in Council and assigned Bill No. 4-129, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on September 29, 1981, and October 13, 1981, respectively. Signed by the Mayor on October 30, 1981, it was assigned Act No. 4-105 and transmitted to both Houses of Congress for its review.

Purpose of Congress in enacting this section was to make criminal the use of all contrivances by which money or property is bet or wagered or risked on the chance of some material reward. *Washington Coin Mach. Ass'n v. Callahan*, 142 F.2d 97 (D.C. Cir. 1944).

Two offenses are created by this section: One is the setting up or keeping of a gaming table or device, and the other is the keeping of a house, vessel or place for the purpose of gaming. *Wade v. United States*, 33 App. D.C. 29 (1909).

Proof of passing money need not be alleged in indictment. — An indictment in either a case of maintaining a table or a place in which gaming was done need not allege proof of passing money; but if it is drawn in almost the language of this section and charges both the place and table the defendants were conducting, that is sufficient. *Beard v. United States*, 82 F.2d 837 (D.C. Cir.), cert. denied, 298 U.S. 655, 56 S. Ct. 675, 80 L. Ed. 1382 (1936).

"Gaming table" defined. — Any games, devices or contrivances set up or kept for the purpose of gaming, or any gambling device, so set up and kept, adapted, devised and designed for the purpose of playing any game of chance for money or property, and to which the public may resort to bid or wager money, is a gaming table within the meaning of this section. *Swan v. United States*, 295 F. 921 (D.C. Cir. 1923).

Term "property," as used in this section, includes goods, chattels, effects, evidences of

rights in action and all written instruments by which any pecuniary obligation, or money or right or title to property, real or personal, is created or transferred but none of such terms should be expanded to include a free amusement feature such as privilege of playing an additional free game if certain score is made. *Washington Coin Mach. Ass'n v. Callahan*, 142 F.2d 97 (D.C. Cir. 1944).

"Gambling device". — To "gamble" is to risk one's money or other property on an event, chance or contingency in the hope of the realization of gain, and the test as to whether a particular machine combination constitutes a "gambling device" is whether it is adapted, devised and designed for the purpose of playing any game of chance for money or property. *Washington Coin Mach. Ass'n v. Callahan*, 142 F.2d 97 (D.C. Cir. 1944).

"Claw machine," used for the purpose of obtaining articles by mere chance, is a "gambling device." *Boosalis v. Crawford*, 99 F.2d 374 (D.C. Cir. 1938).

Gravamen of offense of setting up and keeping gaming place is furnishing the facilities for gaming activities and it is immaterial that betting actually took place or that money actually passed. *Sesso v. United States*, 133 F.2d 381 (D.C. Cir. 1942).

Maintainer of gambling place not necessarily owner or lessee of premises. — It is not necessary that one charged with the crime of maintaining a gambling place should have been in permanent possession of the place or a lessee or keeper, but it is sufficient if he is in charge of the place at the time the offense occurs. *Donald v. United States*, 102 F.2d 618 (D.C. Cir. 1939); *Sesso v. United States*, 133 F.2d 381 (D.C. Cir. 1942).

And premises need not be open to public. — This section reaches any operator who would permit any person to bet on side of or against the keeper of a gaming house, and persons who operated a betting office where they received wagers and maintained records of wins and losses were guilty of violating this section, notwithstanding the fact that they con-

ducted their operations by telephone and that they did not invite the public to their offices. *Silverman v. United States*, 275 F.2d 173 (D.C. Cir. 1960), rev'd on other grounds, 365 U.S. 505, 81 S. Ct. 679, 5 L. Ed. 2d 734 (1961).

But mere taking of bet not within scope of section. — This section, penalizing anyone setting up in the District of Columbia any "gaming table", indicates a physical device of some sort and does not include the mere taking of a bet on a race. *Plummer v. United States*, 189 F.2d 19 (D.C. Cir. 1951).

Evidence sufficient to sustain conviction for keeping gaming table. *Brown v.*

United States, 32 F.2d 953 (D.C. Cir. 1929); *Warde v. United States*, 158 F.2d 651 (D.C. Cir. 1946).

Cited in *Zerega v. United States*, 32 F.2d 963 (D.C. Cir. 1929); *Kelleher v. United States*, 35 F.2d 877 (D.C. Cir. 1929); *Nuckols v. United States*, 99 F.2d 353 (D.C. Cir.), cert. denied, 305 U.S. 626, 59 S. Ct. 89, 83 L. Ed. 401 (1938); *United States v. Plisco*, 22 F. Supp. 242 (D.D.C. 1938); *McDonald v. United States*, 335 U.S. 451, 69 S. Ct. 191, 93 L. Ed. 153 (1948); *Accarino v. United States*, 179 F.2d 456 (D.C. Cir. 1949); *Scheve v. United States*, 184 F.2d 695 (D.C. Cir. 1950).

§ 22-1505. Gambling premises; definition; prohibition against maintaining; forfeiture; liens; deposit of moneys in Treasury; penalty; subsequent offenses.

(a) Any house, building, vessel, shed, booth, shelter, vehicle, enclosure, room, lot, or other premises in the District of Columbia, used or to be used in violating the provisions of § 22-1501 or § 22-1504, shall be deemed "gambling premises" for the purpose of this section.

(b) It shall be unlawful for any person in the District of Columbia knowingly, as owner, lessee, agent, employee, operator, occupant, or otherwise, to maintain, or aid, or permit the maintaining of any gambling premises.

(c) All moneys, vehicles, furnishings, fixtures, equipment, stock (including, without limitation, furnishings and fixtures adaptable to nongambling uses, and equipment and stock for printing, recording, computing, transporting, safekeeping, or communication), or other things of value used or to be used: (1) in carrying on or conducting any lottery, or the game or device commonly known as a policy lottery or policy, contrary to the provisions of § 22-1501; (2) in setting up or keeping any gaming table, bank, or device contrary to the provisions of § 22-1504; or (3) in maintaining any gambling premises; shall be subject to seizure by any member of the Metropolitan Police force, or the United States Park Police, or the United States Marshal, or any Deputy Marshal, for the District of Columbia, and any property seized regardless of its value shall be proceeded against in the Superior Court of the District of Columbia by libel action brought in the name of the District of Columbia by the Corporation Counsel or any Assistant Corporation Counsel, and shall, unless good cause be shown to the contrary, be forfeited to the District of Columbia and shall be made available for the use of any agency of the government of the District of Columbia, or otherwise disposed of as the Mayor of the District of Columbia may, by order or by regulation, provide; provided, that if there be bona fide liens against the property so forfeited, then such property shall be disposed of by public auction. The proceeds of the sale of such property shall be available, first, for the payment of all expenses incident to such sale; and, second, for the payment of such liens; and the remainder shall be deposited in the Treasury of the United States to the credit of the District of Columbia. To the extent necessary, liens against said property so forfeited shall, on good

cause shown by the lienor, be transferred from the property to the proceeds of the sale of the property.

(d) Whoever violates this section shall be imprisoned not more than 180 days or fined not more than \$1,000, or both, unless the violation occurs after the person has been convicted of a violation of this section, in which case the person may be imprisoned for not more than 5 years, or fined not more than \$2,000, or both. (Mar. 3, 1901, 31 Stat. 1331, ch. 854, § 866; June 29, 1953, 67 Stat. 95, ch. 159, § 206(b); Sept. 21, 1961, 75 Stat. 540, Pub. L. 87-259, § 1; July 8, 1963, 77 Stat. 77, Pub. L. 88-60, § 1; July 29, 1970, 84 Stat. 570, Pub. L. 91-358, title I, § 155(a); 1973 Ed., § 22-1505; May 21, 1994, D.C. Law 10-119, § 2(l), 41 DCR 1639; Aug. 20, 1994, D.C. Law 10-151, § 105(i), 41 DCR 2608.)

Cross references. — As to return of property by Property Clerk, see § 4-167.

As to search warrants, see § 23-521 et seq.

Section references. — This section is referred to in §§ 22-1507 and 23-546.

Effect of amendments. — D.C. Law 10-119 substituted "Assistant Corporation Counsel" for "of his assistants" in the first sentence of (c); and substituted "the person" for "he" twice in (d).

D.C. Law 10-151 substituted "180 days" for "1 year" in (d).

Emergency act amendments. — For temporary amendment of section, see § 105(i) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-119. — See note to § 22-1501.

Legislative history of Law 10-151. — See note to § 22-1502.

Change in government. — This section originated at a time when local government powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 401 of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of the functions of the Board of Commissioners under this section to a single Commissioner. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-211), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-213(a)), appropriate changes in terminology were made in this section.

Construction. — Considering the original legislative intent and statutory structure, a

liberal construction of this section should not be used to expand the types of forfeitable items, but rather to broadly define prohibited games and devices. *District of Columbia v. 313 M St.*, App. D.C., 633 A.2d 820 (1993).

Applicability. — This section may be applied to anyone who violates it in any capacity, without regard to whether he or she is the owner, occupant, or person in control of the alleged gambling premises. *Lawson v. United States*, App. D.C., 596 A.2d 504 (1991).

The forfeiture provision of the criminal gambling statutes extends to real property. *District of Columbia v. 313 M St.*, App. D.C., 633 A.2d 820 (1993).

Preponderance of evidence needed for forfeiture. — A showing by a preponderance of the evidence that moneys found on the defendant were in fact used or to be used in an unlawful gambling operation is sufficient to meet the statutory test required for forfeiture of property. \$1,407.00 in *United States Currency v. District of Columbia*, App. D.C., 242 A.2d 217 (1968); \$6,200.00 in *United States Currency v. District of Columbia*, App. D.C., 250 A.2d 551 (1969); *Vasile v. District of Columbia*, App. D.C., 296 A.2d 443 (1972); *Spencer v. District of Columbia*, App. D.C., 615 A.2d 586 (1992).

As libel action is civil in nature. — Libel actions for forfeiture of moneys used or to be used in carrying on a lottery are civil in nature and the government need only prove its case by a preponderance of the evidence. \$3,265.28 in *United States Currency v. District of Columbia*, App. D.C., 249 A.2d 516 (1969); *Vasile v. District of Columbia*, App. D.C., 296 A.2d 443 (1972).

Jury trial on whether property illegally employed. — The claimant of property, which is not per se unlawful and which is sought to be forfeited pursuant to this section, is entitled to a trial by jury to decide the issue whether the property was illegally employed. *Carithers v. District of Columbia*, App. D.C., 326 A.2d 798 (1974).

Owner's rights after seizure of property.

— The owners of property, held by District of Columbia as preliminary to libel proceedings for its forfeiture pursuant to this section, could apply for administrative relief, could sue the officers who seize the property in trespass or could assert their right as claimants in the libel when filed. *United States v. Bell*, 120 F. Supp. 670 (D.D.C. 1954).

And court may order return of property.

— The court, in a criminal proceeding against the owners of property held by the District of Columbia as preliminary to a proceeding for its forfeiture pursuant to this section, has the jurisdiction to order the return of the property. *United States v. Bell*, 120 F. Supp. 670 (D.D.C. 1954); *Peak v. United States*, App. D.C., 419 A.2d 1006 (1980).

But court may not transfer property to lienholder. — Even though a sale at a public auction of a motor vehicle, seized because it was used for gambling purposes in violation of law, would result in insufficient funds to fully discharge a lien, the court was without power to direct transfer in specie as an alternative to the auction sale directed by this section. *GMAC v. One 1962 Chevrolet Sedan*, App. D.C., 191 A.2d 140 (1963).

"Claw machine" is gambling device subject to forfeiture. *Boosalis v. Crawford*, 99 F.2d 374 (D.C. Cir. 1938).

Conspiracy deemed separate, but chargeable offense. — The crime of conspiracy to violate lottery laws and violations of this section are not so closely connected as to render applicable a proposition that where a concert of action between 2 or more persons is logically necessary to a crime's completion, a charge of conspiracy will not lie against such persons. *Woods v. United States*, 240 F.2d 37 (D.C. Cir. 1956), cert. denied, 353 U.S. 941, 77 S. Ct. 815,

1 L. Ed. 2d 760, cert. denied, 354 U.S. 926, 77 S. Ct. 1385, 1 L. Ed. 2d 1438 (1957).

Presumption of forfeitability. — The introduction of evidence sufficient to show by a preponderance that the relevant property was used or intended for use in illegal gambling activity raises a rebuttable presumption of forfeitability. *Spencer v. District of Columbia*, App. D.C., 615 A.2d 586 (1992).

Evidence sufficient to support judgment of forfeiture of property. — See *Thomas v. District of Columbia*, App. D.C., 293 A.2d 882 (1972); *Short v. District of Columbia*, App. D.C., 300 A.2d 450 (1973).

Evidence sufficient to support conviction for maintenance of gambling premises. — See *Aikens v. United States*, 232 F.2d 66 (D.C. Cir. 1956); *Ellis v. United States*, 270 F.2d 448 (D.C. Cir.), cert. denied, 361 U.S. 916, 80 S. Ct. 260, 4 L. Ed. 2d 185 (1959).

Cited in *Kelleher v. United States*, 35 F.2d 877 (D.C. Cir. 1929); *Davis v. United States*, 274 F.2d 585 (D.C. Cir. 1959), cert. denied, 363 U.S. 806, 80 S. Ct. 1241, 4 L. Ed. 2d 1149 (1960); *United States v. Long*, 169 F. Supp. 730 (D.D.C. 1959); *Minovitz v. United States*, 298 F.2d 682 (D.C. Cir. 1962); *United States v. Berry*, 463 F.2d 1278 (D.C. Cir. 1972); *Ray v. United States*, App. D.C., 288 A.2d 239 (1972); *District of Columbia v. Ray*, App. D.C., 305 A.2d 531 (1973); *United States v. Myles*, 430 F. Supp. 98 (D.D.C. 1977), aff'd, 569 F.2d 161 (D.C. Cir. 1978); *United States v. Williams*, 580 F.2d 578 (D.C. Cir.), cert. denied, 439 U.S. 832, 99 S. Ct. 112, 58 L. Ed. 2d 127 (1978); *Davis v. United States*, App. D.C., 390 A.2d 976 (1978); *District of Columbia v. \$59.00 in United States Currency (Melvin King)*, 117 WLR 785 (Super. Ct. 1989); *District of Columbia v. Patterson*, App. D.C., 667 A.2d 1338 (1995).

§ 22-1506. Three-card monte and confidence games.

Whoever shall in the District deal, play, or practice, or be in any manner accessory to the dealing or practicing, of the confidence game or swindle known as 3-card monte, or of any such game, play, or practice, or any other confidence game, play, or practice, shall be deemed guilty of a misdemeanor, and shall be punished by a fine not exceeding \$1,000 and by imprisonment for not more than 180 days. (Mar. 3, 1901, 31 Stat. 1331, ch. 854, § 867; 1973 Ed., § 22-1506; Aug. 20, 1994, D.C. Law 10-151, § 105(j), 41 DCR 2608.)

Cross references. — As to theft, see § 22-3811.

As to fraud, see § 22-3821.

As to search warrants, see § 23-521 et seq.

Section references. — This section is referred to in § 22-1507.

Effect of amendments. — D.C. Law 10-151 substituted "180 days" for "5 years."

Emergency act amendments. — For temporary amendment of section, see § 105(j) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — See note to § 22-1502.

Construction of section. — Since the

thrust of this section is against gambling, the doctrine of *ejusdem generis* is controlling and the general language “any other confidence game, play, or practice” must be limited in application to gambling activities similar to “three-card monte.” *United States v. Brown*, App. D.C., 309 A.2d 256 (1973).

Elements of crime of “confidence game” are (1) an intentional false representation to the victim as to some present fact, (2) knowing it to be false, (3) with intent that the victim rely on the representation, (4) the representation being made to obtain the victim’s confidence and thereafter his money and property, (5) which confidence is then abused by defendant. *United States v. Brown*, App. D.C., 309 A.2d 256 (1973).

Section outlaws mere playing of 3-card monte; its application is not limited to fraudulent playing of the game. *Thorne v. United States*, App. D.C., 452 A.2d 170 (1982).

Prosecution only by indictment. —

Though denominated a misdemeanor by this section, the prescribed penalty of up to 5 years imprisonment make offense of “three-card monte and confidence games” prosecutable only by indictment. *United States v. Brown*, App. D.C., 309 A.2d 256 (1973).

This section is not proper vehicle for prosecuting other forms of fraud or deceit. *United States v. Brown*, App. D.C., 309 A.2d 256 (1973).

This section cannot be applied for the purpose of prosecuting the obtaining of money by trick. *Bond v. United States*, App. D.C., 310 A.2d 221 (1973).

This section does not apply to the commission of the classic “short con” game known as “pigeon drop.” *Pender v. United States*, App. D.C., 310 A.2d 252 (1973).

Cited in *Coleman v. United States*, 215 F.2d 681 (D.C. Cir. 1954); *Mozelle v. United States*, App. D.C., 310 A.2d 213 (1973).

§ 22-1507. “Gaming table” defined.

All games, devices, or contrivances at which money or any other thing shall be bet or wagered shall be deemed a gaming table within the meaning of §§ 22-1504 to 22-1506; and the courts shall construe said sections liberally, so as to prevent the mischief intended to be guarded against. (Mar. 3, 1901, 31 Stat. 1331, ch. 854, § 868; 1973 Ed., § 22-1507.)

Cross references. — As to search warrants, see § 23-521 et seq.

Construction. — Forfeiture is penal in nature; courts apply forfeiture statutes with care, strictly construing their provisions. *District of Columbia v. 313 M St.*, App. D.C., 633 A.2d 820 (1993).

This section indicates physical device of some sort and does not mean the mere taking

of a bet on a race. *Plummer v. United States*, 189 F.2d 19 (D.C. Cir. 1951).

Indictment is sufficient which alleges a setting up of a gaming table and the keeping of a gaming table for the purpose of betting on the results of horse races. *Swan v. United States*, 295 F. 921 (D.C. Cir. 1923).

§ 22-1508. Gambling pools and bookmaking; athletic contest defined.

It shall be unlawful for any person, or association of persons, within the District of Columbia to purchase, possess, own, or acquire any chance, right, or interest, tangible or intangible, in any policy lottery or any lottery, or to make or place a bet or wager, accept a bet or wager, gamble or make books or pools on the result of any athletic contest. For the purpose of this section, the term “athletic contest” means any of the following, wherever held or to be held: a football, baseball, softball, basketball, hockey, or polo game, or a tennis, golf, or wrestling match, or a tennis or golf tournament, or a prize fight or boxing match, or a trotting or running race of horses, or a running race of dogs, or any other athletic or sporting event or contest. Any person or association of persons violating this section shall be fined not more than \$1,000 or imprisoned not more than 180 days, or both. (Mar. 3, 1901, 31 Stat. 1331, ch. 854, § 869; May

16, 1908, 35 Stat. 164, ch. 172, § 3; June 29, 1953, 67 Stat. 96, ch. 159, § 206c; 1973 Ed., § 22-1508; Aug. 20, 1994, D.C. Law 10-151, § 105(k), 41 DCR 2608.)

Cross references. — As to search warrants, see § 23-521 et seq.

Section references. — This section is referred to in § 22-1502.

Effect of amendments. — D.C. Law 10-151 substituted “180 days” for “1 year” in the third sentence.

Emergency act amendments. — For temporary amendment of section, see § 105(k) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — See note to § 22-1502.

Persons engaging in wagering contests are not accomplices. *Paylor v. United States*, 42 App. D.C. 428, cert. denied, 235 U.S. 704, 35 S. Ct. 209, 59 L. Ed. 434 (1914).

Cited in *Baker v. Warner*, 231 U.S. 588, 34 S. Ct. 175, 58 L. Ed. 384 (1913); *Kelleher v. United States*, 35 F.2d 877 (D.C. Cir. 1929); *United States v. Haje*, 159 F. Supp. 870 (D.D.C. 1958); *Minovitz v. United States*, 298 F.2d 682 (D.C. Cir. 1962); *United States v. Gianaris*, 454 F. Supp. 505 (D.D.C. 1977), aff’d, 589 F.2d 1116 (D.C. Cir. 1978), cert. denied, 440 U.S. 917, 99 S. Ct. 1235, 59 L. Ed. 2d 467 (1979); *Davis v. United States*, App. D.C., 390 A.2d 976 (1978).

§ 22-1509. Bucketing, and bucket-shopping and bucket-shops; definitions.

The following words and phrases used in §§ 22-1509 to 22-1512 shall, unless a different meaning is plainly required by the context, have the following meanings:

(1) “Person” shall mean an individual, partnership, corporation, or association, whether acting in their own right or as the officer, agent, servant, correspondent, or representative of another.

(2) “Contract” shall mean any agreement, trade, or transaction.

(3) “Securities” shall mean all evidences of debt or property and options for the purchase and sale thereof, shares in any corporation or association bonds, coupons, scrip, rights, choses in action, and other evidences of debt or property and options for the purchase or sale thereof.

(4) “Commodities” shall mean anything movable that is bought and sold.

(5) “Bucket-shop” shall mean any room, office, store, building, or other place where any contract prohibited by §§ 22-1509 to 22-1512 is made or offered to be made.

(6) “Keeper” shall mean any person owning, keeping, managing, operating, or promoting a bucket-shop, or assisting to keep, manage, operate, or promote a bucket-shop.

(7) “Bucketing” or “bucket-shopping” shall mean:

(A) The making of or offering to make any contract respecting the purchase or sale, either upon credit or upon margin, of any securities or commodities wherein both parties thereto intend, or such keeper intends, that such contract shall be, or may be, terminated, closed, or settled according to or upon the basis of the public market quotations of prices made on any board of trade or exchange upon which said securities or commodities are dealt in and without a bona fide purchase or sale of the same; or

(B) The making of or offering to make any contract respecting the purchase or sale, either upon credit or upon margin, of any securities or commodities, wherein both parties intend, or such keeper intends, that such contract shall be, or may be, deemed terminated, closed, or settled when such

public market quotations of prices for the securities or commodities named in such contract shall reach a certain figure without a bona fide purchase or sale of the same; or

(C) The making of or offering to make any contract respecting the purchase or sale, either upon credit or upon margin, of any securities or commodities wherein both parties do not intend, or such keeper does not intend, the actual or bona fide receipt or delivery of such securities or commodities, but do intend, or such keeper does intend, a settlement of such contract based upon the differences in such public market quotations of prices at which said securities or commodities are or are asserted to be bought and sold. (Mar. 3, 1901, ch. 854, § 869a; Mar. 1, 1909, 35 Stat. 670, ch. 233; 1973 Ed., § 22-1509; May 21, 1994, D.C. Law 10-119, § 2(m), 41 DCR 1639.)

Section references. — This section is referred to in §§ 22-1510 to 22-1512.

Effect of amendments. — D.C. Law 10-119 deleted “his or” preceding “their” in (1).

Legislative history of Law 10-119. — See note to § 22-1501.

Effect of state law prohibiting or regulating operation of bucket-shops. — Section 4 of the Act of October 13, 1982, Pub. L. 97-303 provided that no state law which prohibits or regulates the operation of “bucket-shops” or other similar or related activities shall invalidate any put, call, straddle, option, privilege, or other security, or apply to any activity which is incidental or related to the offer, purchase, sale, exercise, settlement, or closeout of any such instrument, if such instrument is traded pursuant to rules and regulations to a self-regula-

tory organization that are filed with the Securities and Exchange Commission pursuant to § 19(b) of the Securities Exchange Act of 1934.

Meaning of “contract”. — The provision in this section that, unless a different meaning is plainly required by the context, the word “contract” when used in §§ 22-1509 to 22-1512, shall mean “any agreement, trade, or transaction,” does not invalidate such sections as prohibiting all agreements, trades and transactions, but refers only to the particular kinds of contracts elsewhere described in such sections, namely bucketing and bucket-shop contracts, or all agreements, trades and transactions relating thereto. *United States v. Cella*, 37 App. D.C. 423 (1911), cert. denied, 223 U.S. 728, 32 S. Ct. 526, 56 L. Ed. 633 (1912).

§ 22-1510. Penalty for bucketing or keeping bucket-shop.

Any person who makes or offers to make any contract defined in § 22-1509, or who is the keeper of any bucket-shop, shall, upon conviction thereof, be punished by a fine not exceeding \$1,000 or by imprisonment for not more than 180 days. Any person who shall be convicted of a second offense shall be punished by imprisonment for not more than 5 years. The continuing of the keeping of a bucket-shop by any person after the first conviction therefor shall be deemed a second offense under §§ 22-1509 to 22-1512. If a domestic corporation shall be convicted of a second offense, the Superior Court of the District of Columbia shall have jurisdiction, upon an information in equity in the name of the United States Attorney for the District of Columbia, on the relation of the Mayor of the District of Columbia, to dissolve the corporation; and if a foreign corporation shall be convicted of a second offense, the Superior Court of the District of Columbia shall have jurisdiction, in the same manner, to restrain the corporation, from doing business in the District of Columbia. (Mar. 3, 1901, ch. 854, § 869b; Mar. 1, 1909, 35 Stat. 671, ch. 233; June 25, 1936, 49 Stat. 1921, ch. 804; June 25, 1948, 62 Stat. 909, 991, ch. 646, §§ 1, 32(b); May 24, 1949, 63 Stat. 107, ch. 139, § 127; July 29, 1970, 84 Stat. 570,

Pub. L. 91-358, title I, § 155(c) (1) (E); 1973 Ed., § 22-1510; Aug. 20, 1994, D.C. Law 10-151, § 105(l), 41 DCR 2608.)

Section references. — This section is referred to in §§ 22-1509, 22-1511 and 22-1512.

Effect of amendments. — D.C. Law 10-151 substituted “180 days” for “1 year” in the first sentence.

Emergency act amendments. — For temporary amendment of section, see § 105(l) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — See note to § 22-1502.

Change in government. — This section originated at a time when local government powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmen-

tal Organization in Volume 1). Section 401 of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of the functions of the Board of Commissioners under this section to a single Commissioner. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-211), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-213(a)), appropriate changes in terminology were made in this section.

§ 22-1511. Penalty for communicating, receiving, exhibiting, or displaying quotations of prices.

Any person who shall communicate, receive, exhibit, or display in any manner any statement of quotations of prices of any securities or commodities with an intent to make, or offer to make, or to aid in making, or offering to make any contract prohibited by §§ 22-1509 to 22-1512, upon conviction thereof shall be subject to the penalties provided in § 22-1510. (Mar. 3, 1901, ch. 854, § 869c; Mar. 1, 1909, 35 Stat. 671, ch. 233; 1973 Ed., § 22-1511.)

Section references. — This section is referred to in §§ 22-1509, 22-1510 and 22-1512.

§ 22-1512. Bucketing; written statement to be furnished; contents.

Every person shall furnish, upon demand, to any customer or principal for whom such person has executed any order for the actual purchase or sale of any securities or commodities, either for immediate or future delivery, a written statement, containing the names of the persons from whom such property was bought or to whom it has been sold, as the fact may be, the time when, place where, and the price at which the same was either bought or sold; and if such person shall refuse or neglect to furnish such statement within 24 hours after such demand such refusal or neglect shall be prima facie evidence that such purchase or sale was bucketing or bucket-shopping within the terms of §§ 22-1509 to 22-1512. (Mar. 3, 1901, ch. 854, § 869d; Mar. 1, 1909, 35 Stat. 671, ch. 233; 1973 Ed., § 22-1512.)

Section references. — This section is referred to in §§ 22-1509 to 22-1511.

§ 22-1513. Corrupt influence in connection with athletic contests.

(a) It shall be unlawful to pay or give, or to agree to pay or give, or to promise or offer, any valuable thing to any individual:

(1) With intent to influence such individual to lose or cause to be lost, or to attempt to lose or cause to be lost, or to limit or attempt to limit such individual or his or her team's margin of victory or score in, any professional or amateur athletic contest in which such individual is or may be a contestant or participant; or

(2) With intent to influence such individual, in the case of any professional or amateur athletic contest in connection with which such individual (as a manager, coach, owner, second, jockey, trainer, handler, groom, or otherwise) has or will have any duty or responsibility with respect to a contestant, participant, or team who or which is engaging or may engage therein, to cause or attempt to cause:

(A) The loss of such athletic contest by such contestant, participant, or team; or

(B) The margin of victory or score of such contestant, participant, or team to be limited; or

(3) With intent to influence such individual, in the case of any professional or amateur athletic contest in connection with which such individual is to be or may be a referee, judge, umpire, linesman, starter, timekeeper, or other similar official, to cause or attempt to cause:

(A) The loss of such athletic contest by any contestant, participant, or team who or which is engaging or may engage therein; or

(B) The margin of victory or score of any such contestant, participant, or team to be limited.

(b) It shall be unlawful for any individual to solicit or accept, or to agree to accept, any valuable thing or a promise or offer of any valuable thing:

(1) To influence such individual to lose or cause to be lost, or to attempt to lose or cause to be lost, or to limit or attempt to limit such individual or his or her team's margin of victory or score in, any professional or amateur athletic contest in which such individual is or may be a contestant or participant; or

(2) To influence such individual, in the case of any professional or amateur athletic contest in connection with which such individual (as a manager, coach, owner, second, jockey, trainer, handler, groom, or otherwise) has or will have any duty or responsibility with respect to a contestant, participant, or team who or which is engaging or may engage therein, to cause or attempt to cause:

(A) The loss of such athletic contest by such contestant, participant, or team; or

(B) The margin of victory or score of such contestant, participant, or team to be limited; or

(3) To influence such individual, in the case of any professional or amateur athletic contest in connection with which such individual is to be or may be a referee, judge, umpire, linesman, starter, timekeeper, or other similar official, to cause or attempt to cause:

(A) The loss of such athletic contest by any contestant, participant, or team who or which is engaging or may engage therein; or

(B) The margin of victory or score of any such contestant, participant, or team to be limited.

(c) Whoever violates any provision of subsection (a) of this section shall be guilty of a felony, and, upon conviction thereof, shall be punished by imprisonment for not less than 1 year nor more than 5 years and by a fine of not more than \$10,000.

(d) Whoever violates any provision of subsection (b) of this section shall, upon conviction thereof, be punished by imprisonment for not more than 1 year and by a fine of not more than \$5,000.

(e) As used in this section, the term “athletic contest” means any of the following, wherever held or to be held: A football, baseball, softball, basketball, hockey, or polo game, or a tennis or wrestling match, or a prize fight or boxing match, or a horse race or any other athletic or sporting event or contest.

(f) Nothing in this section shall be construed to prohibit the giving or offering of any bonus or extra compensation to any manager, coach, or professional player, or to any league, association, or conference for the purpose of encouraging such manager, coach, or player to a higher degree of skill, ability, or diligence in the performance of his or her duties. (Mar. 3, 1901, ch. 854, § 869e; July 11, 1947, 61 Stat. 313, ch. 230; Dec. 27, 1967, 81 Stat. 737, Pub. L. 90-226, title VI, § 604; 1973 Ed., § 22-1513; May 21, 1994, D.C. Law 10-119, § 2(n), 41 DCR 1639.)

Section references. — This section is referred to in § 23-546.

Effect of amendments. — D.C. Law 10-119 substituted “such individual or his or her team’s” for “his or his team’s” in (a)(1) and

(b)(1); and substituted “his or her” for “his” in (f).

Legislative history of Law 10-119. — See note to § 22-1501.

§ 22-1514. Immunity of witnesses; record.

(a) Whenever, in the judgment of the United States Attorney for the District of Columbia, the testimony of any witness, or the production of books, papers, or other records or documents, by any witness, in any case or proceeding involving a violation of this subchapter before any grand jury or a court in the District of Columbia, is necessary in the public interest, such witness shall not be excused from testifying or from producing books, papers, and other records and documents on the grounds that the testimony or evidence, documentary or otherwise, required of such witness may tend to incriminate such witness, or subject such witness to penalty or forfeiture; but such witness shall not be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which such witness is compelled, after having claimed his or her privilege against self-incrimination, to testify or produce evidence, documentary or otherwise; except that such witness so testifying shall not be exempt from prosecution and punishment for perjury or contempt committed in so testifying.

(b) The judgment of the United States Attorney for the District of Columbia that any testimony, or the production of any books, papers, or other records or

documents, is necessary in the public interest shall be confirmed in a written communication over the signature of the United States Attorney for the District of Columbia, addressed to the grand jury or the court in the District of Columbia concerned, and shall be made a part of the record of the case or proceeding in which such testimony or evidence is given. (Mar. 3, 1901, ch. 854, § 869f; June 29, 1953, 67 Stat. 96, ch. 159, § 206(d); 1973 Ed., § 22-1514; Mar. 10, 1981, D.C. Law 3-172, § 2, 27 DCR 4736; May 21, 1994, D.C. Law 10-119, § 2(o), 41 DCR 1639.)

Effect of amendments. — D.C. Law 10-119, in (a), inserted “or her” and substituted “such witness” three times for “him” and once for “he.”

Legislative history of Law 3-172. — Law 3-172, the “Law to Legalize Lotteries, Daily Numbers Games, and Bingo and Raffles for Charitable Purposes in the District of Columbia,” was submitted to the electors of the District of Columbia on November 4, 1980, as Initiative No. 6. The results of the voting, certified by the Board of Elections and Ethics on November 21, 1980, were 104,899 for the Initiative and 59,833 against the Initiative. It was transmitted to both Houses of Congress for its review on January 19, 1981.

Legislative history of Law 10-119. — See note to § 22-1501.

This section is not unconstitutional on basis of alleged uncertainty as the immu-

nity is provided with reference to state as well as federal prosecutions. In re Flanagan, 350 F.2d 746 (D.C. Cir. 1965).

This section does not operate unless witness testifies or gives evidence over his claim of privilege against self-incrimination. In re Flanagan, 350 F.2d 746 (D.C. Cir. 1965).

And immunity encompasses offenses where conviction not yet final. — The immunity granted by this section encompasses an immunity for an offense for which the witness has been convicted, although judgment on the conviction was not final because a timely appeal from the judgment was pending, but that did not alter the witness’ obligation to testify before the grand jury when directed to do so and failure to do so constitutes civil contempt. In re Flanagan, 350 F.2d 746 (D.C. Cir. 1965).

§ 22-1515. Presence in illegal establishments.

Repealed. Aug. 20, 1994, D.C. Law 10-151, § 110(a), 41 DCR 2608.

Cross references. — As to sale of alcoholic beverages without license, see § 25-109.

As to drinking in unlicensed places, see § 25-128.

As to unlawful acts under Uniform Controlled Substances Act, see §§ 33-541 to 33-543a.

Emergency act amendments. — For temporary repeal of section, see § 110(a) of the

Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-119. — See note to § 22-1501.

Legislative history of Law 10-151. — See note to § 22-1502.

Editor’s notes. — Former § 22-1515 had also been amended by D.C. Law 10-119, § 9(b).

Subchapter II. Legalization.

§ 22-1516. Statement of purpose.

It is the purpose of this subchapter to legalize lotteries, daily numbers games, bingo, raffles, and Monte Carlo night parties, which activities are to be conducted only by the District of Columbia and only those licensed by the District of Columbia and subject to the jurisdiction, authority, and control of the District of Columbia. These activities will provide revenue to the District of Columbia and will provide the citizens of the District of Columbia financial benefits. (Mar. 10, 1981, D.C. Law 3-172, § 3, 27 DCR 4736; Apr. 11, 1987, D.C. Law 6-220, § 2(a)(1), 34 DCR 900.)

Legislative history of Law 3-172. — See note to § 22-1514.

Legislative history of Law 6-220. — Law 6-220, the "Monte Carlo Night Party Licensure Amendment Act of 1986," was introduced in Council and assigned Bill No. 6-527, which referred to the Committee on Government Operations. The Bill was adopted on first and

second readings on November 18, 1986 and December 16, 1986, respectively. Signed by the Mayor on January 8, 1987, it was assigned Act No. 6-276 and transmitted to both Houses of Congress for its review.

Cited in Mack v. United States, App. D.C., 464 A.2d 114 (1983).

§ 22-1517. Permissible gambling activities.

Nothing in subchapter I of this chapter shall be construed to prohibit the operation of or participation in lotteries and/or daily numbers games operated by and for the benefit of the District of Columbia by the Lottery and Charitable Games Control Board; bingo, raffles, and Monte Carlo night parties organized for educational and charitable purposes, regulated by the District of Columbia Lottery and Charitable Games Control Board. (Mar. 10, 1981, D.C. Law 3-172, § 3, 27 DCR 4736; Apr. 11, 1987, D.C. Law 6-220, § 2(a)(2), 34 DCR 900.)

Section references. — This section is referred to in § 22-1518.

Legislative history of Law 3-172. — See note to § 22-1514.

Legislative history of Law 6-220. — See note to § 22-1516.

Cited in Mack v. United States, App. D.C., 464 A.2d 114 (1983).

§ 22-1518. Advertising and promotion; sale and possession of lottery and numbers tickets and slips.

Nothing in subchapter I of this chapter shall be construed to prohibit the advertising and promotion of excepted permissible gambling activities pursuant to § 22-1517, hereof, including but not limited to: The sale, by agents authorized by the District of Columbia, and the possession of tickets, certificates, or slips for lottery and daily numbers games excepted and permissible pursuant to § 22-1517, hereof, and the sale, lease, purchase, or possession of tickets, slips, certificates, or cards for bingo, raffles, and Monte Carlo night parties, excepted and permissible pursuant to § 22-1517, hereof. (Mar. 10, 1981, D.C. Law 3-172, § 3, 27 DCR 4736; Apr. 11, 1987, D.C. Law 6-220, § 2(a)(3), 34 DCR 900.)

Legislative history of Law 3-172. — See note to § 22-1514.

Legislative history of Law 6-220. — See note to § 22-1516.

Cited in Mack v. United States, App. D.C., 464 A.2d 114 (1983).

CHAPTER 16. GAME AND FISH LAWS.

Sec.

22-1601 to 22-1606. [Repealed].

22-1607. [Transferred].

22-1608 to 22-1627. [Repealed].

22-1628. Council's authority with respect to wild animals, fishing licenses, and migratory birds; exception; "wild animals" defined.

22-1629. Inspection of business or vocational establishments requiring a license or permit or any vehicle, boat, market box, market stall or cold storage plant, during business hours.

Sec.

22-1630. Seizure of hunting and fishing equipment; sale at public auction and disposal of proceeds; disposal of property not sold at auction; payment of valid liens after sale.

22-1631. Penalties; prosecutions.

22-1632. Delegation of functions by Secretary of the Interior and Mayor; Council to make regulations; "Mayor" and "Secretary of the Interior" defined.

22-1633. Existing authority of Secretary of the Interior not impaired.

§§ 22-1601 to 22-1606. Prohibition and control of net fishing in Potomac River; catching and killing bass; "person" defined; sale of bass prohibited; sale and possession of shad or herring; sale of small striped bass; use of explosives and drugs in fishing prohibited.

Repealed. Aug. 23, 1958, 72 Stat. 815, Pub. L. 85-730, § 8 (a), (e).

§ 22-1607. Penalties.

Transferred.

Editor's notes. — This section was transferred to § 22-1703a by the Act of August 23, 1958, 72 Stat. 815, Pub. L. 85-730, § 7.

§§ 22-1608 to 22-1627. Confiscation of fishing equipment used in violation of the law; sale and possession of woodcocks, squirrels, rabbits, wild chicks, wild geese, and certain game birds; inspection of premises to detect violation of game laws; trespassing for purposes of hunting; shooting or having guns in possession on a Sunday; killing or capturing game beyond District jurisdiction; compensation for persons securing convictions under game laws; killing game birds and permits therefor; hunting squirrels, chipmunks and rabbits without a permit; killing of English sparrow or wild animal suffering from disease or injury; hunting or disbursing of ducks, geese, and waterfowl;

sale, possession, or purchase of certain types of birds prohibited; license for certain scientific purposes; sale of birds raised in captivity or for propagation.

Repealed. Aug. 23, 1958, 72 Stat. 815, Pub. L. 85-730, § 8 (a)-(d).

§ 22-1628. Council's authority with respect to wild animals, fishing licenses, and migratory birds; exception; "wild animals" defined.

The Council of the District of Columbia is authorized to restrict, prohibit, regulate, and control hunting and fishing and the taking, possession, and sale of wild animals in the District; provided, that nothing herein contained shall authorize the Council to impose any requirement for a fishing license or fee of any nature whatsoever; provided further, that nothing herein contained shall authorize the Council to prohibit, restrict, regulate, or control the killing, capture, purchase, sale, or possession of migratory birds as defined in regulations issued pursuant to the Migratory Bird Treaty Act of July 3, 1918, as amended (16 U.S.C. §§ 703-712) and taken for scientific, propagating, or other purposes under permits issued by the Secretary of the Interior; and provided further, that nothing herein contained shall authorize the Council to prohibit, restrict, regulate, or control the sale or possession of wild animals taken legally in any state, territory or possession of the United States or in any foreign country, or produced on a game farm, except as may be necessary to protect the public health or safety. As used in this section the term "wild animals" includes, without limitation, mammals, birds, fish, and reptiles not ordinarily domesticated. (Aug. 23, 1958, 72 Stat. 814, Pub. L. 85-730, § 1; 1973 Ed., § 22-1628.)

Change in government. — This section originated at a time when local government powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 402(204) of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of the functions of the Board of Commissioners under this section to the District of Columbia Council, subject to the right of the Commissioner as provided in § 406 of the Plan. The

District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-211), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-213(a)), appropriate changes in terminology were made in this section.

§ 22-1629. Inspection of business or vocational establishments requiring a license or permit or any vehicle, boat, market box, market stall or cold storage plant, during business hours.

Authorized officers and employees of the government of the United States or of the government of the District of Columbia are, for the purpose of enforcing

the provisions of this chapter and the regulations promulgated by the Council of the District of Columbia under the authority of this chapter, empowered, during business hours, to inspect any building or premises in or on which any business, trade, vocation, or occupation requiring a license or permit is carried on, or any vehicle, boat, market box, market stall, or cold-storage plant. No person shall refuse to permit any such inspection. (Aug. 23, 1958, 72 Stat. 814, Pub. L. 85-730, § 2; 1973 Ed., § 22-1629.)

Change in government. — This section originated at a time when local government powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 402(204) of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of the functions of the Board of Commissioners under this section to the District of Columbia Council, subject to the right of the Commissioner as provided in § 406 of the Plan. The

District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-211), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-213(a)), appropriate changes in terminology were made in this section.

§ 22-1630. Seizure of hunting and fishing equipment; sale at public auction and disposal of proceeds; disposal of property not sold at auction; payment of valid liens after sale.

(a) All rifles, shotguns, ammunition, bows, arrows, traps, seines, nets, boats, and other devices of every nature or description used by any person within the District of Columbia when engaged in killing, ensnaring, trapping, or capturing any wild bird, wild mammal, or fish contrary to this chapter or any regulation made pursuant to this chapter shall be seized by any police officer upon the arrest of such person on a charge of violating any provision of this chapter or any regulations made pursuant thereto, and be delivered to the Mayor. If the person so arrested is acquitted, the property so seized shall be returned to the person in whose possession it was found. If the person so arrested is convicted, the property so seized shall, in the discretion of the court, be forfeited to the District of Columbia, and be sold at public auction, the proceeds from such sale to be deposited in the Treasury to the credit of the District of Columbia. If any item of such property is not purchased at such auction, it shall be disposed of in accordance with regulations prescribed by the District of Columbia Council.

(b) If any property seized under the authority of this section is subject to a lien which is established by intervention or otherwise to the satisfaction of the court as having been created without the lienor's having any notice that such property was to be used in connection with a violation of any provision of this chapter or any regulation made pursuant thereto, the court, upon the conviction of the accused, may order a sale of such property at public auction. The officer conducting such sale, after deducting proper fees and costs incident to the seizure, keeping, and sale of such property, shall pay all such liens according to their priorities, and such lien or liens shall be transferred from the

property to the proceeds of the sale thereof. (Aug. 23, 1958, 72 Stat. 814, Pub. L. 85-730, § 3; 1973 Ed., § 22-1630.)

Cross references. — As to return of property by Property Clerk, see § 4-167.

Change in government. — This section originated at a time when local government powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 402(205) of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of the functions of the Board of Commissioners under this section to the District of Columbia Council, subject to the right of the Commis-

sioner as provided in § 406 of the Plan. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-211), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-213(a)), appropriate changes in terminology were made in this section.

§ 22-1631. Penalties; prosecutions.

(a) Any person convicted of violating any provision of this chapter, or any regulation made pursuant to this chapter, shall be fined not more than \$300 or imprisoned not more than 90 days, or both.

(b) Prosecutions for violations of this chapter, or the regulations made pursuant thereto, shall be conducted in the name of the District of Columbia by the Corporation Counsel or any Assistant Corporation Counsel. (Aug. 23, 1958, 72 Stat. 815, Pub. L. 85-730, § 4; 1973 Ed., § 22-1631; May 21, 1994, D.C. Law 10-119, § 11(a), 41 DCR 1639.)

Effect of amendments. — D.C. Law 10-119 substituted "Assistant Corporation Counsel" for "of his assistants" in (b).

Legislative history of Law 10-119. — Law 10-119, the "Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-332, which was referred to the

Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

§ 22-1632. Delegation of functions by Secretary of the Interior and Mayor; Council to make regulations; "Mayor" and "Secretary of the Interior" defined.

(a) The Secretary of the Interior and the Mayor, respectively, are authorized to delegate any of the functions to be performed by them under the authority of this chapter.

(b) The Council of the District of Columbia is authorized to make such regulations as may be necessary to carry out the purpose of this chapter; provided, that any regulations issued pursuant to this chapter shall be subject to the approval of the Secretary of the Interior insofar as they involve any areas or waters of the District of Columbia under the appropriate administrative jurisdiction.

(c) As used in this chapter the word “Mayor” means the Mayor of the District of Columbia or the appropriate designated agent or agents, and the words “Secretary of the Interior” means the Secretary of the Interior or the appropriate designated agent or agents. (Aug. 23, 1958, 72 Stat. 815, Pub. L. 85-730, § 5; 1973 Ed., § 22-1632; May 21, 1994, D.C. Law 10-119, § 11(b), 41 DCR 1639.)

Effect of amendments. — D.C. Law 10-119 substituted “the appropriate” for “his” once in (b) and twice in (c).

Legislative history of Law 10-119. — See note to § 22-1631.

Change in government. — This section originated at a time when local government powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 402(204) of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of the functions of the Board of Commissioners

under this section to the District of Columbia Council, subject to the right of the Commissioner as provided in § 406 of the Plan. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-211), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-213(a)), appropriate changes in terminology were made in this section.

§ 22-1633. Existing authority of Secretary of the Interior not impaired.

Nothing in this chapter or in any regulation promulgated by the Council of the District of Columbia under the authority of this chapter shall in any way impair the existing authority of the Secretary of the Interior to control and manage fish and wildlife on the land and waters in the District of Columbia under the Secretary of the Interior’s administrative jurisdiction. (Aug. 23, 1958, 72 Stat. 815, Pub. L. 85-730, § 6; 1973 Ed., § 22-1633; May 21, 1994, D.C. Law 10-119, § 11(c), 41 DCR 1639.)

Effect of amendments. — D.C. Law 10-119 substituted “the Secretary of the Interior’s” for “his” near the end.

Legislative history of Law 10-119. — See note to § 22-1631.

Change in government. — This section originated at a time when local government powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 402(204) of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of the functions of the Board of Commissioners

under this section to the District of Columbia Council, subject to the right of the Commissioner as provided in § 406 of the Plan. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-211), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-213(a)), appropriate changes in terminology were made in this section.

CHAPTER 17. HARBOR REGULATIONS.

Sec.

22-1701. Harbor regulations; authority vested in Council; compliance with federal law required; District and federal statutes and regulations supplemented.

Sec.

22-1702. Throwing or depositing matter in Potomac River.

22-1703. Deposits of deleterious matter in Rock Creek or Potomac River.

22-1703a. Penalties for violation of § 22-1703.

§ 22-1701. Harbor regulations; authority vested in Council; compliance with federal law required; District and federal statutes and regulations supplemented.

The Council of the District of Columbia is hereby vested with authority to make harbor regulations for the entire water-front of the city within the District of Columbia, to alter and amend the same from time to time as it may find necessary; provided, that nothing in this section shall be construed or applied to require or excuse noncompliance with any provision of any federal law or regulation. This section shall not supersede but shall supplement all statutes and regulations of the District of Columbia and the United States in which similar conduct is prohibited or regulated. (Mar. 3, 1901, 31 Stat. 1335, ch. 854, § 895; June 30, 1902, 32 Stat. 535, ch. 1329; Feb. 8, 1904, 33 Stat. 11, ch. 152, §§ 1, 2; June 6, 1924, ch. 270, § 9; June 15, 1934, 48 Stat. 963, ch. 536; July 19, 1952, 66 Stat. 790, ch. 949, § 1; 1973 Ed., § 22-1701; Sept. 28, 1979, D.C. Law 3-25, § 4, 26 DCR 497.)

Cross references. — As to duty of Metropolitan Police to enforce harbor regulations, see § 4-107.

As to publication and effect of rules and regulations, see §§ 4-177 and 4-178.

As to jurisdiction and control of wharves, see §§ 9-101 and 9-102.

As to water pollution control, see subchapter III of Chapter 9 of Title 6.

As to fish wharf and market, see § 10-137.

Legislative history of Law 3-25. — Law 3-25, the "Harbor and Boating Safety Act of 1979," was introduced in Council and assigned Bill No. 3-61. The Bill was adopted on first and second readings on June 5, 1979 and June 19, 1979, respectively. Signed by the Mayor on July 12, 1979, it was assigned Act No. 3-70 and transmitted to both Houses of Congress for its review.

New implementing regulations. — Pursuant to this section, the following new regulations were adopted in 1979: The "Harbor and Boating Safety Act of 1979" (D.C. Law 3-25, Sept. 28, 1979, 26 DCR 497).

Change in government. — This section originated at a time when local government

powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 402(206) of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of the functions of the Board of Commissioners under this section to the District of Columbia Council, subject to the right of the Commissioner as provided in § 406 of the Plan. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-211), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-213(a)), appropriate changes in terminology were made in this section.

Cited in *Petersen v. Head Constr. Co.*, 367 F. Supp. 1072 (D.D.C. 1973).

§ 22-1702. Throwing or depositing matter in Potomac River.

(a) It shall be unlawful for any owner or occupant of any wharf or dock, any master or captain of any vessel, or any person or persons to cast, throw, drop, or deposit any stone, gravel, sand, ballast, dirt, oyster shells, or ashes in the water in any part of the Potomac River or its tributaries in the District of Columbia, or on the shores of said river below highwater mark, unless for the purpose of making a wharf, after permission has been obtained from the Mayor of the District of Columbia for that purpose, which wharf shall be sufficiently inclosed and secured so as to prevent injury to navigation.

(b) It shall be unlawful for any owner or occupant of any wharf or dock, any captain or master of any vessel, or any other person or persons to cast, throw, deposit, or drop in any dock or in the waters of the Potomac River or its tributaries in the District of Columbia any dead fish, fish offal, dead animals of any kind, condemned oysters in the shell, watermelons, cantaloupes, vegetables, fruits, shavings, hay, straw, or filth of any kind whatsoever.

(c) Nothing in this section contained shall be construed to interfere with the work of improvement in or along the said river and harbor under the supervision of the United States government.

(d) Any person or persons violating any of the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine not exceeding \$100, or by imprisonment not exceeding 6 months, or both, in the discretion of the court. (Feb. 3, 1913, 37 Stat. 656, ch. 25; 1973 Ed., § 22-1702.)

Cross references. — As to discharge of pollutants from vessels or onshore or offshore facilities, removal of such pollutants, and contingency plan for environmental emergencies, see § 6-928.

Change in government. — This section originated at a time when local government powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 401 of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of

the functions of the Board of Commissioners under this section to a single Commissioner. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-211), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-213(a)), appropriate changes in terminology were made in this section.

§ 22-1703. Deposits of deleterious matter in Rock Creek or Potomac River.

No person shall allow any tar, oil, ammoniacal liquor, or other waste products of any gas works or works engaged in using such products, or any waste product whatever of any mechanical, chemical, manufacturing, or refining establishment to flow into or be deposited in Rock Creek or the Potomac River or any of its tributaries within the District of Columbia or into any pipe or conduit leading to the same. (Mar. 3, 1901, 31 Stat. 1336, ch. 854, § 901; 1973 Ed., § 22-1703.)

Section references. — This section is referred to in § 22-1703a.

Prohibition of this section is general and unqualified, and applies to all alike, and prevents the discharge of any such waste products. *Holden v. United States*, 24 App. D.C. 318 (1904), cert. denied, 196 U.S. 639, 25 S. Ct. 796, 49 L. Ed. 631 (1905).

Liability not question of negligence. — When a construction company places tanks on

the banks of a navigable stream within the limits of the city and a substance from the tanks escapes into the river and interferes with its public use, it is liable irrespective of the question of negligence. *Brennan Constr. Co. v. Cumberland*, 29 App. D.C. 554 (1907).

Cited in *United States v. Georgetown Univ.*, 331 F. Supp. 69 (D.D.C. 1971).

§ 22-1703a. Penalties for violation of § 22-1703.

Any person who shall violate any provision of § 22-1703 shall for each such offense be fined not more than \$300 or imprisoned not more than 90 days, or both. (Mar. 3, 1901, 31 Stat. 1336, ch. 854, § 902; Aug. 23, 1958, 72 Stat. 815, Pub. L. 85-730, § 7; 1973 Ed., § 22-1703a.)

CHAPTER 18. BURGLARY.

Sec.

22-1801. Definition and penalty.

§ 22-1801. Definition and penalty.

(a) Whoever shall, either in the nighttime or in the daytime, break and enter, or enter without breaking, any dwelling, or room used as a sleeping apartment in any building, with intent to break and carry away any part thereof, or any fixture or other thing attached to or connected thereto or to commit any criminal offense, shall, if any person is in any part of such dwelling or sleeping apartment at the time of such breaking and entering, or entering without breaking, be guilty of burglary in the first degree. Burglary in the first degree shall be punished by imprisonment for not less than 5 years nor more than 30 years.

(b) Except as provided in subsection (a) of this section, whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building or any apartment or room, whether at the time occupied or not, or any steamboat, canalboat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be guilty of burglary in the second degree. Burglary in the second degree shall be punished by imprisonment for not less than 2 years nor more than 15 years. (Mar. 3, 1901, 31 Stat. 1323, ch. 854, § 823; Dec. 27, 1967, 81 Stat. 736, Pub. L. 90-226, title VI, § 602; 1973 Ed., § 22-1801.)

Cross references. — As to unlawful entry, see § 22-3102.

As to additional penalty for possession of firearm, see § 22-3202.

As to theft, see § 22-3811.

Section references. — This section is referred to in §§ 11-502, 23-546 and 23-581.

Common law crime of burglary has been replaced by statutory crime, denominated first degree burglary, and the common law crime no longer exists. *United States v. Kearney*, 498 F.2d 61 (D.C. Cir. 1974).

Right to speedy trial not violated. — In a prosecution for first degree theft and second degree burglary, appellant failed to show that his right to a speedy trial was violated where most of the almost twenty-four months of delay between appellant's arrest and trial was due to neutral reasons and was therefore charged against the government; where there was no indication that the government deliberately delayed in an attempt to gain a tactical advantage; where appellant did not assert his right to a speedy trial explicitly, clearly, early, and without ulterior motive to merely shorten his confinement on another charge; and where appel-

lant did not show prejudice caused by the delay. *Turner v. United States*, App. D.C., 622 A.2d 667 (1993).

Unlawful entry with intent to commit offense constitutes crime, hence, the actual commission of the other offense is not necessary. *Lee v. United States*, 37 App. D.C. 442 (1911).

Entry into a closed store constitutes burglary if the entry coincides, in point of time, with an intent to steal once therein, even though the intended theft was not consummated. *United States v. Fox*, 433 F.2d 1235 (D.C. Cir. 1970); *Massey v. United States*, App. D.C., 320 A.2d 296 (1974).

The crime of burglary is established by an unlawful entry accompanied by an intent to steal, though such intent may be conditioned on locating the property that the offender desires to remove. *United States v. Sinclair*, 444 F.2d 888 (D.C. Cir. 1971).

First degree burglary, an offense against habitation, is completed when an individual enters an occupied dwelling with the intent to commit a criminal offense. *Strickland v. United States*,

App. D.C., 332 A.2d 746, cert. denied, 423 U.S. 846, 96 S. Ct. 84, 46 L. Ed. 2d 67 (1975).

Elements of armed first degree burglary.

— In order to prove armed first degree burglary, the government must establish, beyond a reasonable doubt, an armed entry (by defendant or by a principal aided and abetted by defendant) into an occupied dwelling with the intent to commit a crime therein. *Marshall v. United States*, App. D.C., 623 A.2d 551 (1992).

Crucial element of offense of second degree burglary is specific intent which impelled entry and not the lawful or unlawful manner of entry. *United States v. Jeffries*, 45 F.R.D. 110 (D.D.C. 1968); *Massey v. United States*, App. D.C., 320 A.2d 296 (1974).

Intent must be formed at time of entry.

— The intent to commit the crime inside the premises must have been formed by the time of the entry. *Marshall v. United States*, App. D.C., 623 A.2d 551 (1992).

Intent need not be put into effect.

— Because burglary consists only of an entry with intent to commit another offense, it is irrelevant that defendant did not actually carry out that intent inside her house. *Bowman v. United States*, App. D.C., 652 A.2d 64 (1994).

Intent of subsection (a). — The intent of the legislature in regard to subsection (a) is clear from the ordinary meaning of its words; the statute seeks to punish any entry, with the intent to commit a crime, of a dwelling at a time when another person is located anywhere within the confines of that dwelling. *Edelen v. United States*, App. D.C., 560 A.2d 527 (1989).

Intent may be inferred from circumstances. — Proof that the accused entered the premises armed and disguised as a woman and accompanied by another man who also carried a concealed firearm, that they both obtained consent to their entry under pretext and, as soon as money appeared on the game table, accused and his companion whipped out their guns, robbed the occupants and fled sustained the finding that when the accused entered the apartment, he possessed the criminal intent required by this section. *United States v. Kearney*, 498 F.2d 61 (D.C. Cir. 1974).

Due process would not be violated by permitting the jury to infer from a defendant's possession of recently stolen property that defendant intended to commit an offense at the time of his unlawful entry into a building. *United States v. Carter*, 522 F.2d 666 (D.C. Cir. 1975).

Specific intent in a burglary case, unless admitted by the defendant, must usually be proved by circumstantial evidence or by some statement the defendant makes at the time of the burglary. *Williams v. United States*, App. D.C., 549 A.2d 328 (1988).

Evidence of "other circumstances" and inferences therefrom was sufficient to allow the jurors to find that when defendant entered the

victim's home without authority, he did so with aggressiveness and hostility, so as to support conviction for burglary. *Johnson v. United States*, App. D.C., 613 A.2d 888 (1992).

And criminal intent may negate consent to enter. — Under this section defining a burglary as an entry, without breaking, with the intent to commit any criminal offense, consent to enter is not a defense where one is shown to have entered with the requisite criminal intent. *United States v. Kearney*, 498 F.2d 61 (D.C. Cir. 1974).

Consent to enter is not a defense to burglary where one is shown to have entered with the requisite criminal intent. *McKinnon v. United States*, App. D.C., 644 A.2d 438, cert. denied, — U.S. —, 115 S. Ct. 523, 130 L. Ed. 2d 428 (1994).

Commission of offense evidences intent.

— Fact that defendant actually committed an assault very soon after he was inside house was strong circumstantial evidence that he intended to commit an assault at the time he entered. *Bowman v. United States*, App. D.C., 652 A.2d 64 (1994).

Unlawful entry bears heavily on question of defendant's intent to commit second degree burglary, but it is not a prerequisite to the establishment of such an intent. *United States v. Jeffries*, 45 F.R.D. 110 (D.D.C. 1968).

But may not be decisive. — The fact of unlawful entry, even in the nighttime, may not support an inference that the entry was made with an intent to steal. *United States v. Melton*, 491 F.2d 45 (D.C. Cir. 1973).

And failure to allege unlawful entry in burglary charge harmless. — A failure to allege an unlawful entry in count charging second degree burglary amounted to no more than harmless error. *United States v. Jeffries*, 45 F.R.D. 110 (D.D.C. 1968).

Entry of buildings generally. — Entry as an element of a burglary is established by the penetration into a dwelling or similar edifice by any part of the defendant's body or by any instrument inserted into the edifice by the defendant to gain entry. *Edelen v. United States*, App. D.C., 560 A.2d 527 (1989).

Ownership of premises. — In a prosecution for burglary or attempted burglary, government must prove that the building, or other premises involved, was the property of another. *Douglas v. United States*, App. D.C., 570 A.2d 772 (1990).

In prosecution for attempted burglary, government was obliged to prove only that the store was the property of someone other than the defendants; it did not have to prove precisely who the owner was, so long as the evidence established that defendants were not the owners. *Douglas v. United States*, App. D.C., 570 A.2d 772 (1990).

Unlawful entry does not prove specific intent to steal on prior occasions. — The

fact that defendant entered a building without permission to do so cannot be relied upon to prove his specific intent to steal on prior occasions; to hold otherwise would obliterate the clear distinction the legislature has drawn between burglary and unlawful entry. *Williams v. United States*, App. D.C., 549 A.2d 328 (1988).

Evidence sufficient to support finding of specific intent to steal. — Government established beyond a reasonable doubt that defendant initially entered the victim's apartment with the intention to steal. *Byrd v. United States*, App. D.C., 618 A.2d 596 (1992).

Particular room entered in burglary need not be identified. — An attempt to identify the particular room which was broken into in an indictment charging larceny of a watch and entering a room with the intent to commit larceny was harmless surplusage. *Fretz v. United States*, 140 F.2d 468 (D.C. Cir. 1944).

Entry into occupied dwelling. — Where victim entered her apartment before defendant, who followed behind her, she was thus physically in the apartment prior to his entry. Consequently, when he entered the apartment with the intent to rape her, he did so when "any person is in any part of such dwelling," and his actions thus constituted all the elements of burglary in the first degree. *Edelen v. United States*, App. D.C., 560 A.2d 527 (1989).

Two first degree burglary while armed counts merged where they were both based on entry into an apartment. *Hanna v. United States*, 666 A.2d 845 (D.C. App. 1995).

Multiple entries into a dwelling with intent to steal do not merge into a single offense when the burglar has managed to obtain complete control over the home by murdering its occupants. *Byrd v. United States*, App. D.C., 618 A.2d 596 (1992).

Full allegation of ulterior crime not required. — In an indictment for burglary, the ulterior crime need not be alleged as fully as would be necessary if the ulterior crime were, itself, the offense charged; it is ordinarily sufficient to allege the offense in general terms. *United States v. Thomas*, 444 F.2d 919 (D.C. Cir. 1971).

But must be sufficiently identified. — An indictment charging that the defendant entered a dwelling "with intent to commit a criminal offense therein" is insufficient to charge first or second degree burglary in that it does not identify the offense that the defendant intended to commit upon entry. *United States v. Thomas*, 444 F.2d 919 (D.C. Cir. 1971); *United States v. Seegers*, 445 F.2d 232 (D.C. Cir. 1971).

"Criminal offense," in this section, includes petit larceny. *United States v. Fox*, 433 F.2d 1235 (D.C. Cir. 1970).

But proof of larceny does not establish burglary. *White v. United States*, App. D.C., 300 A.2d 716 (1973).

Possession of stolen goods not sufficient for conviction. — Where there was no evidence of a breaking or evidence placing the defendant within the building, the fact that the defendant was in possession of recently stolen goods belonging to the business did not establish burglary in the second degree. *White v. United States*, App. D.C., 300 A.2d 716 (1973).

Purpose of stating burglary victim's name in indictment. — The purpose of the law in requiring the name of the person who occupied and used the building entered to be stated in the indictment is to negative the defendant's right to break and enter and to protect him from a 2nd prosecution for the same offense. *Bord v. United States*, 133 F.2d 313 (D.C. Cir.), cert. denied, 317 U.S. 671, 63 S. Ct. 77, 87 L. Ed. 539 (1942).

Housebreaking, robbery and burglary are merely aggravated forms of larceny. *Edwards v. United States*, 139 F.2d 365 (D.C. Cir. 1943), cert. denied, 321 U.S. 769, 64 S. Ct. 523, 88 L. Ed. 1064 (1944); *Coleman v. United States*, App. D.C., 298 A.2d 40 (1972), cert. denied, 413 U.S. 921, 93 S. Ct. 3070, 37 L. Ed. 2d 1043 (1973).

And first degree burglary is lesser included offense of first degree burglary while armed. *Franey v. United States*, App. D.C., 382 A.2d 1019 (1978).

Element that distinguishes burglary from unlawful entry is the intent to commit a crime once the unlawful entry has been accomplished. *United States v. Melton*, 491 F.2d 45 (D.C. Cir. 1973).

While in some circumstances elements of unlawful entry are comprehended within those of housebreaking, the latter requires also a finding of larcenous intent. *Stewart v. United States*, 324 F.2d 443 (D.C. Cir. 1963); *Hebble v. United States*, App. D.C., 257 A.2d 483 (1969); *United States v. Whitaker*, 447 F.2d 314 (D.C. Cir. 1971).

Burglary and forcible entry distinguished. — While burglary does not include the element of breaking with force, the offense of forcible entry does. *United States v. Melton*, 491 F.2d 45 (D.C. Cir. 1973).

Counts of housebreaking and robbery charged independent crimes, since the housebreaking count charged and made necessary proof of entry of a dwelling with the intent to steal property but proof of entry was not essential to the robbery count, whereas the robbery charge required proof of taking, in a particular manner, of something of value from the victim's person or immediate actual possession, facts that were not essential elements of housebreaking. *Irby v. United States*, 250 F. Supp. 983 (D.D.C. 1965), aff'd, 390 F.2d 432 (D.C. Cir. 1967).

Housebreaking and robbery convictions can stand together since the robbery and burglary

statutes which codify common law protect distinct societal interests. *Dixon v. United States*, App. D.C., 320 A.2d 318 (1974).

Ancient distinction that robbery offends person and burglary habitation has not been obliterated by Congress with respect to the District of Columbia, even where the robbery inside a dwelling follows closely on the heels of a housebreaking of that dwelling. *Irby v. United States*, 250 F. Supp. 983 (D.D.C. 1965), *aff'd*, 390 F.2d 432 (D.C. Cir. 1967).

Theft and burglary convictions did not merge. — Conviction for unauthorized use of a vehicle did not merge with a robbery conviction, and a theft conviction did not merge with a burglary conviction, as each conviction required a different element of proof. *Matthews v. United States*, App. D.C., 629 A.2d 1185 (1993).

First degree burglary while armed count did not merge with kidnapping, armed robbery, or assault with dangerous weapon counts because burglary requires proof of an element (entry into a dwelling with criminal intent) that the other first incident crimes do not. Kidnapping (victim was seized or detained), armed robbery (property of value was taken), and assault with a dangerous weapon (forceful or violent attempt to inflict bodily harm) all require proof of elements that burglary does not. *Hanna v. United States*, 666 A.2d 845 (D.C. App. 1995).

First degree burglary while armed count did not merge with carrying a pistol without a license count. First degree burglary while armed (§§ 22-1801, 22-3202) requires proof that the defendant entered a dwelling of another person — when a person was present in the dwelling — while armed or having readily available a firearm or any other dangerous weapon, but the weapon need not be an operable and unlicensed pistol. *Hanna v. United States*, 666 A.2d 845 (D.C. App. 1995).

Verdicts of acquittal on attempted burglary and guilty on petit larceny. — The trial court could have found defendant, who was carrying goods stolen from an apartment building, which he later abandoned when he attempted to flee, guilty of both attempted burglary and petit larceny on the inference of guilt raised by the defendant's unexplained possession of recently stolen property or even on the basis of this inference the trier of the facts could have had a reasonable doubt that the defendant had the necessary criminal intent upon entering the apartment building to be convicted of attempted burglary, and thus verdicts of acquittal on attempted burglary charge and guilty on petit larceny charge were not necessarily inconsistent or irreconcilable. *Barnes v. United States*, App. D.C., 254 A.2d 724 (1969).

Or acquittal on larceny but conviction on burglary charges. — Verdicts acquitting a

defendant of larceny while convicting him of burglary are not fatally inconsistent in prosecution in which officer testified that he found defendant in looted store holding cigarettes. *United States v. Fox*, 433 F.2d 1235 (D.C. Cir. 1970).

Where missing jewelry was never recovered, the fact that the defendants, charged with second degree burglary and grand larceny arising out of an apparent theft from a jewelry store, were convicted of burglary but found not guilty of grand larceny does not demonstrate an inconsistency in the jury verdict. *United States v. Simpson*, 445 F.2d 735 (D.C. Cir. 1970).

Convictions for burglary and felony murder proper. — A defendant can properly be convicted of both first degree burglary and felony murder, in view of the fact that the felony of first degree burglary while armed and murder are separately identifiable crimes that offend multiple societal interests, and therefore, the doctrine of merger is inapplicable. *Blango v. United States*, App. D.C., 373 A.2d 885 (1977).

Application of the merger doctrine is unwarranted where burglary served as a predicate for a felony murder, in view of fact that § 22-2401 expressly provides that even the purposeless killing of another during housebreaking while armed constitutes first degree murder, and in view of fact that societal interest served by this section is separate and distinct from that of § 22-2401. *Harris v. United States*, App. D.C., 377 A.2d 34 (1977).

Underlying felony merges into felony murder conviction so that the convictions for the felonies of rape, robbery, and burglary, which underlay a felony murder conviction, should be vacated. *Leasure v. United States*, App. D.C., 458 A.2d 726 (1983).

Because appellants' convictions for felony murder and the underlying felony of armed burglary merge, the Court of Appeals remanded the case with instructions to vacate the armed burglary convictions and resentencing accordingly. *Williams v. United States*, App. D.C., 483 A.2d 292 (1984), *cert. denied*, 474 U.S. 906, 106 S. Ct. 275, 88 L. Ed. 2d 236 (1985).

Defendant's felony murder convictions merged with the underlying felonies of armed burglary and armed robbery. *Thacker v. United States*, App. D.C., 599 A.2d 52 (1991).

Defendant can be sentenced for both felony murder during burglary while armed and felony murder during attempted armed robbery arising out of the same shooting of a single victim since the defendant violated 2 statutory provisions requiring proof of different elements. *Adams v. United States*, App. D.C., 466 A.2d 439 (1983).

Unlawful entry is a lesser included offense of burglary. *Roane v. United States*, App. D.C., 432 A.2d 1218 (1981).

One may be guilty of burglary and yet not be guilty of unlawful entry. *Buckman v. District of Columbia Dep't of Emp. Servs.*, App. D.C., 505 A.2d 771 (1986).

Failure to give lesser included offense instruction requires remand. — The trial court's failure to give a requested instruction that unlawful entry is a lesser included offense of burglary requires remand for entry of a judgment of conviction of unlawful entry or, if the trial court believes it in the interests of justice, a new trial. *Roane v. United States*, App. D.C., 432 A.2d 1218 (1981).

Procedure where one conviction out of several improper. — Where jury had been improperly permitted to return verdicts of guilty on counts of receiving stolen property when it had also returned verdicts of guilty on burglary and grand larceny counts, but the convictions for burglary and larceny were proper except for the sentences, which might have been shorter had there not been the accompanying receiving convictions, the proper remedy was to vacate the convictions for receiving stolen goods and the sentences for burglary and larceny and remand for resentencing. *Franklin v. United States*, App. D.C., 392 A.2d 516 (1978), cert. denied, 440 U.S. 948, 99 S.Ct. 1428, 59 L. Ed. 2d 637 (1979).

Murder, housebreaking and larceny deemed separate offenses. — The offenses of murder, housebreaking and larceny each require elements of proof which are not common to other 2 and each offense is historically an independent crime. *United States v. Butler*, 462 F.2d 1195 (D.C. Cir. 1972).

Unlawful or forcible entry statutes distinguished. — Neither the unlawful entry statute nor the forcible entry statute engrafts any additional elements on this section; the unlawful entry statute does not purport to amend this section and does not do so by operation of law, expressly or impliedly, nor do the requirements of the unlawful entry statute constitute additional elements of every second degree burglary. *United States v. Kearney*, 498 F.2d 61 (D.C. Cir. 1974).

Evidence insufficient to support finding of specific intent to steal. See *North v. United States*, App. D.C., 530 A.2d 1161 (1987).

See *Parker v. United States*, App. D.C., 449 A.2d 1076 (1982).

Entry without permission does not constitute intent to steal. — The fact that a defendant enters a premises without permission to do so cannot on its own constitute sufficient evidence of an intention to steal. *Shelton v. United States*, App. D.C., 505 A.2d 767 (1986).

Evidence sufficient to sustain conviction for burglary in first degree. — See *Fretz v. United States*, 140 F.2d 468 (D.C. Cir. 1944); *United States v. Carmichael*, 469 F.2d

937 (D.C. Cir. 1972); *Blango v. United States*, App. D.C., 373 A.2d 885 (1977); *Franey v. United States*, App. D.C., 382 A.2d 1019 (1978); *Byrd v. United States*, App. D.C., 388 A.2d 1225 (1978); *Christian v. United States*, App. D.C., 394 A.2d 1 (1978), cert. denied, 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315 (1979); *Calaway v. United States*, App. D.C., 408 A.2d 1220 (1979); *Robinson v. United States*, App. D.C., 565 A.2d 964 (1989).

Evidence insufficient to sustain conviction for first degree burglary. — See *United States v. Hammonds*, 425 F.2d 597 (D.C. Cir. 1970); *United States v. Preston*, 331 F. Supp. 457 (D.D.C. 1971).

Where the only evidence at trial on the issue indicates that 2nd floor bedrooms were not used for sleeping, but were apparently used solely for purposes of consummating prostitution transactions and were occupied essentially for periods of short duration, a conviction under subsection (a) of this section cannot stand. *Jennings v. United States*, App. D.C., 431 A.2d 552 (1981), cert. denied, 457 U.S. 1135, 102 S. Ct. 2964, 73 L. Ed. 2d 1353 (1982).

Evidence sufficient to sustain conviction for attempted first degree burglary. — See *Harris v. United States*, App. D.C., 373 A.2d 590 (1977).

Evidence sufficient to sustain convictions for burglary, felony murder and possession of a prohibited weapon. *Marshall v. United States*, App. D.C., 623 A.2d 551 (1992).

Evidence sufficient to sustain conviction for burglary in second degree. — See *Cady v. United States*, 293 F. 829 (D.C. Cir. 1923); *United States v. Jones*, 433 F.2d 1107 (D.C. Cir. 1970); *United States v. Fox*, 433 F.2d 1235 (D.C. Cir. 1970); *United States v. Rosebar*, 463 F.2d 1255 (D.C. Cir. 1972); *Johnson v. United States*, App. D.C., 293 A.2d 269 (1972); *Franklin v. United States*, App. D.C., 293 A.2d 278 (1972); *Forsyth v. United States*, App. D.C., 318 A.2d 292 (1974); *Massey v. United States*, App. D.C., 320 A.2d 296 (1974); *Manago v. United States*, App. D.C., 331 A.2d 335 (1975); *Malloy v. United States*, App. D.C., 483 A.2d 678 (1984); *Matthews v. United States*, App. D.C., 629 A.2d 1185 (1993); *Wright v. United States*, App. D.C., 637 A.2d 95 (1994).

Evidence insufficient to sustain conviction for second degree burglary. — See *United States v. Carter*, 522 F.2d 666 (D.C. Cir. 1975).

Evidence sufficient to sustain conviction for attempted second degree burglary. — *Manning v. United States*, App. D.C., 270 A.2d 504 (1970); *Hopkins v. United States*, App. D.C., 274 A.2d 418 (1971); *Perry v. United States*, App. D.C., 276 A.2d 719 (1971); *Valentino v. United States*, App. D.C., 296 A.2d 173 (1972); *Baptist v. United States*, App. D.C., 466 A.2d 452 (1983); *Freeman v. United States*,

App. D.C., 495 A.2d 1183 (1985); Douglas v. United States, App. D.C., 570 A.2d 772 (1990).

Evidence insufficient to support conviction for burglary while armed with intent to commit assault. Warrick v. United States, App. D.C., 528 A.2d 438 (1987).

Evidence sufficient to sustain conviction for housebreaking and larceny. — See Bord v. United States, 133 F.2d 313 (D.C. Cir.), cert. denied, 317 U.S. 671, 63 S. Ct. 77, 87 L. Ed. 539 (1942); Garriss v. United States, 418 F.2d 467 (D.C. Cir. 1969).

Evidence sustained conviction for housebreaking. — See Henderson v. United States, 172 F.2d 289 (D.C. Cir. 1949); Braddy v. United States, 225 F.2d 551 (D.C. Cir. 1955); Baber v. United States, 324 F.2d 390 (D.C. Cir. 1963), cert. denied, 376 U.S. 972, 84 S. Ct. 1139, 12 L. Ed. 2d 86 (1964); Brown v. United States, 375 F.2d 310 (D.C. Cir. 1966), cert. denied, 388 U.S. 915, 87 S. Ct. 2133, 18 L. Ed. 2d 1359 (1967).

Evidence sufficient to sustain conviction for attempted housebreaking. — See Hart v. United States, App. D.C., 187 A.2d 329 (1963); Adams v. United States, App. D.C., 245 A.2d 640 (1968).

Evidence sufficient to sustain conviction for unlawful entry. — See United States v. Whitaker, 447 F.2d 314 (D.C. Cir. 1971).

Evidence sufficient to sustain petit larceny conviction. — See Barnes v. United States, App. D.C., 254 A.2d 724 (1969).

Defendant's latent fingerprints recovered from can of air freshener found near point of unlawful entry into a residence were insufficient as the only evidence of guilt to support a conviction for burglary and theft. In re J.C.M., App. D.C., 502 A.2d 472 (1985).

Victim's statements held insufficient to identify defendant. — See In re J.C.M., App. D.C., 502 A.2d 472 (1985).

Evidence insufficient to sustain conviction for attempted second degree burglary. — See Shelton v. United States, App. D.C., 505 A.2d 767 (1986).

Burglary statute covers breaking and entering of metropolitan transit station; the plain meaning of the term "building," is not confined to structures built above ground course, and therefore the fact that the Metro station is below ground is immaterial. Swinson v. United States, App. D.C., 483 A.2d 1160 (1984).

Unexplained possession of stolen property alone cannot support inference of burglary. — Unexplained or unsatisfactorily explained possession of stolen property cannot, by itself, give rise to the inference that a burglary was committed; by itself such evidence only gives rise to the inference that the possessor stole the property or received stolen

property. Hawthorne v. United States, App. D.C., 476 A.2d 164 (1984).

Refusal to sever counts of second degree burglary, petit larceny and destruction of property not clearly erroneous. Wheeler v. United States, App. D.C., 470 A.2d 761 (1983).

Evidence sufficient to warrant jury inference that defendant had removed money from safe. Colbert v. United States, App. D.C., 471 A.2d 258 (1984).

Two burglary convictions, arising from single entry, should merge for purposes of sentencing. — Although government proved two distinct specific intents, intent to destroy property and intent to assault occupant of premises, the two burglary convictions should merge for purposes of sentencing where convictions arose from single entry. Thorne v. United States, App. D.C., 471 A.2d 247 (1983); Stewart v. United States, App. D.C., 490 A.2d 619 (1985).

Counts cannot both be sustained on appeal where defendant was charged with and convicted of two counts of first degree burglary while armed for one entry into the home of victim, and counts respectively alleged that burglary was committed with intent to steal and with intent to assault. Warrick v. United States, App. D.C., 528 A.2d 438 (1987).

Reversible error not found. — Denial of defendant's motion for severance, where defendant was charged with burglary and attempted theft and codefendant was charged with murder, burglary and attempted theft, was not reversible error where evidence against defendant was overwhelming, defendant made no showing of denial of fair trial and due process of law in not being able to call codefendant as a witness, and defense employed by defendant's counsel rather than codefendant's redacted confession created risk that jury might infer defendant was connected with codefendant in commission of crime. Perry v. United States, App. D.C., 571 A.2d 1156 (1990).

Burglary, premeditated murder and robbery convictions did not merge as "one continuous criminal act." Bennett v. United States, App. D.C., 620 A.2d 1342 (1993).

Cited in Anderson v. Rives, 85 F.2d 673 (D.C. Cir. 1936); Akowskey v. United States, 158 F.2d 649 (D.C. Cir. 1946); Wright v. United States, 189 F.2d 699 (D.C. Cir. 1951); Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951); Ellison v. United States, 206 F.2d 476 (D.C. Cir. 1953); Nelms v. United States, 215 F.2d 678 (D.C. Cir. 1954); Payton v. United States, 222 F.2d 794 (D.C. Cir. 1955); Washington v. United States, 232 F.2d 357 (D.C. Cir. 1956); Baker v. United States, 234 F.2d 685 (D.C. Cir.), cert. denied, 352 U.S. 901, 77 S. Ct. 136, 1 L. Ed. 2d 89 (1956), cert. denied, 355 U.S. 864, 78 S. Ct. 98, 2 L. Ed. 2d 70 (1957), cert. denied, 359 U.S. 1005, 79 S. Ct. 1145, 3 L. Ed. 2d 1033, cert.

denied, 362 U.S. 983, 80 S. Ct. 1071, 4 L. Ed. 2d 1017 (1960); *Adams v. United States*, 239 F.2d 451 (D.C. Cir. 1956); *Gaynor v. United States*, 247 F.2d 583 (D.C. Cir. 1957); *Lawson v. United States*, 248 F.2d 654 (D.C. Cir. 1957), cert. denied, 355 U.S. 963, 78 S. Ct. 552, 2 L. Ed. 2d 537 (1958); *Poole v. United States*, 250 F.2d 396 (D.C. Cir. 1957); *White v. United States*, 271 F.2d 829 (D.C. Cir. 1959); *United States v. Sheffield*, 179 F. Supp. 634 (D.D.C. 1959), cert. denied, 363 U.S. 853, 80 S. Ct. 1633, 4 L. Ed. 2d 1735 (1960); *Scott v. United States*, App. D.C., 147 A.2d 767 (1959); *Williams v. United States*, 282 F.2d 867 (D.C. Cir. 1960), cert. denied, 365 U.S. 836, 81 S. Ct. 751, 5 L. Ed. 2d 746 (1961); *De Binder v. United States*, 292 F.2d 737 (D.C. Cir. 1961); *Britton v. United States*, 301 F.2d 531 (D.C. Cir. 1962); *Jackson v. United States*, 302 F.2d 194 (D.C. Cir. 1962); *Cunningham v. United States*, 311 F.2d 772 (D.C. Cir. 1962); *Smith v. United States*, 312 F.2d 867 (D.C. Cir. 1962); *United States v. Naples*, 205 F. Supp. 944 (D.D.C. 1962); *Kramer v. United States*, 317 F.2d 114 (D.C. Cir. 1963); *Jones v. United States*, 338 F.2d 553 (D.C. Cir. 1964); *United States v. Frank*, 225 F. Supp. 573 (D.D.C. 1964); *Shelton v. United States*, 343 F.2d 347 (D.C. Cir.), cert. denied, 382 U.S. 856, 86 S. Ct. 108, 15 L. Ed. 2d 93 (1965); *Kennedy v. United States*, 353 F.2d 462 (D.C. Cir. 1965); *Manning v. United States*, 371 F.2d 353 (D.C. Cir. 1966); *Bush v. United States*, App. D.C., 215 A.2d 853 (1966); *Cureton v. United States*, 396 F.2d 671 (D.C. Cir. 1968); *Wright v. United States*, 404 F.2d 1256 (D.C. Cir. 1968); *Bates v. United States*, 405 F.2d 1104 (D.C. Cir. 1968); *Duckett v. United States*, 410 F.2d 1004 (D.C. Cir. 1969); *Washington v. United States*, 414 F.2d 1119 (D.C. Cir. 1969); *Taylor v. United States*, 414 F.2d 1142 (D.C. Cir. 1969); *United States v. Matthews*, 419 F.2d 1177 (D.C. Cir. 1969); *United States v. Coleman*, 420 F.2d 1313 (D.C. Cir. 1969); *United States v. Barbour*, 420 F.2d 1319 (D.C. Cir. 1969); *Glenn v. United States*, 420 F.2d 1323 (D.C. Cir. 1969); *Weeks v. United States*, App. D.C., 252 A.2d 907 (1969); *United States v. Stevenson*, 424 F.2d 923 (D.C. Cir. 1970); *United States v. Cunningham*, 424 F.2d 942 (D.C. Cir.), cert. denied, 399 U.S. 914, 90 S. Ct. 2218, 26 L. Ed. 2d 572 (1970); *United States v. Lucas*, 426 F.2d 663 (D.C. Cir. 1970); *United States v. Shumate*, 429 F.2d 777 (D.C. Cir. 1970); *Hamilton v. United States*, 433 F.2d 526 (D.C. Cir. 1970), cert. denied, 402 U.S. 944, 91 S. Ct. 1612, 29 L. Ed. 2d 112 (1971); *United States v. Thweatt*, 433 F.2d 1226 (D.C. Cir. 1970); *United States v. Casson*, 434 F.2d 415 (D.C. Cir. 1970); *United States v. Joslin*, 434 F.2d 526 (D.C. Cir. 1970); *United States v. Henderson*, 439 F.2d 531 (D.C. Cir. 1970); *United States v. Morgan*, 443 F.2d 718 (D.C. Cir. 1970); *King v. United States*, App. D.C., 271 A.2d 556 (1970); *United States v. Evans*, 438

F.2d 162 (D.C. Cir.), cert. denied, 402 U.S. 1010, 91 S. Ct. 2196, 29 L. Ed. 2d 432 (1971); *United States v. Delaney*, 442 F.2d 120 (D.C. Cir. 1970); *United States v. Huff*, 442 F.2d 885 (D.C. Cir. 1971); *United States v. Leonard*, 445 F.2d 234 (D.C. Cir. 1971); *United States v. Isaac*, 449 F.2d 1040 (D.C. Cir. 1971); *Brown v. United States*, App. D.C., 282 A.2d 571 (1971); *United States v. Thornton*, 462 F.2d 307 (D.C. Cir. 1972); *United States v. Gillum*, 463 F.2d 957 (D.C. Cir. 1972); *United States v. Coombs*, 464 F.2d 842 (D.C. Cir. 1972); *United States v. Cary*, 470 F.2d 469 (D.C. Cir. 1972); *United States v. Fench*, 470 F.2d 1234 (D.C. Cir. 1972), cert. denied, 410 U.S. 909, 93 S. Ct. 964, 35 L. Ed. 2d 271 (1973); *United States v. Barlow*, 470 F.2d 1245 (D.C. Cir. 1972); *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972); *Stephenson v. United States*, App. D.C., 296 A.2d 606 (1972), cert. denied, 411 U.S. 907, 93 S. Ct. 1535, 36 L. Ed. 2d 197 (1973); *United States v. Lemonakis*, 485 F.2d 941 (D.C. Cir. 1973), cert. denied, 415 U.S. 989, 94 S. Ct. 1586, 39 L. Ed. 2d 885 (1974); *United States v. Gaskins*, 485 F.2d 1046 (D.C. Cir. 1973); *United States v. Douglas*, 488 F.2d 1331 (D.C. Cir. 1973); *Fredericks v. United States*, App. D.C., 306 A.2d 268 (1973); *Conyers v. United States*, App. D.C., 309 A.2d 309 (1973); *United States v. Joyner*, 492 F.2d 650 (D.C. Cir.), cert. denied, 419 U.S. 852, 95 S. Ct. 94, 42 L. Ed. 2d 83 (1974); *United States v. Leonard*, 494 F.2d 955 (D.C. Cir. 1974); *United States v. Thornton*, 498 F.2d 749 (D.C. Cir. 1974); *United States v. Douglas*, 504 F.2d 213 (D.C. Cir. 1974); *United States v. Calloway*, 505 F.2d 311 (D.C. Cir. 1974); *Dunston v. United States*, App. D.C., 315 A.2d 563 (1974); *Crawley v. United States*, App. D.C., 320 A.2d 309 (1974); *Brown v. United States*, App. D.C., 327 A.2d 539 (1974); *Braxton v. United States*, App. D.C., 328 A.2d 385 (1974); *United States v. Barker*, 514 F.2d 208 (D.C. Cir.), cert. denied, 421 U.S. 1013, 95 S. Ct. 2420, 44 L. Ed. 2d 682 (1975); *United States v. Yates*, 524 F.2d 1282 (D.C. Cir. 1975); *Fludd v. United States*, App. D.C., 336 A.2d 539 (1975); *United States v. Engram*, App. D.C., 337 A.2d 488 (1975), cert. denied, 423 U.S. 1058, 96 S. Ct. 793, 46 L. Ed. 2d 648 (1976); *Herbert v. United States*, App. D.C., 340 A.2d 802 (1975); *Hampton v. United States*, App. D.C., 340 A.2d 813 (1975); *In re M.M.J.*, App. D.C., 341 A.2d 421 (1975); *Nichols v. United States*, App. D.C., 343 A.2d 336 (1975); *United States v. Sedgwick*, App. D.C., 345 A.2d 465, application denied, 423 U.S. 1028, 96 S. Ct. 558, 46 L. Ed. 2d 402 (1975), cert. denied, 425 U.S. 966, 96 S. Ct. 1751, 48 L. Ed. 2d 210 (1976); *United States v. Boswell*, App. D.C., 347 A.2d 270 (1975); *In re R.D.J.*, App. D.C., 348 A.2d 301 (1975); *Thomas v. United States*, App. D.C., 351 A.2d 499 (1976); *Harman v. United States*, App. D.C., 351 A.2d 504, cert. denied, 429 U.S. 841, 97 S. Ct. 116, 50 L. Ed. 2d 110 (1976); *Roldan v.*

United States, App. D.C., 353 A.2d 292 (1976); Shanahan v. United States, App. D.C., 354 A.2d 524 (1976); Rhodes v. United States, App. D.C., 354 A.2d 863 (1976); Jackson v. United States, App. D.C., 354 A.2d 869 (1976); Austin v. United States, App. D.C., 356 A.2d 648 (1976); Wilson v. United States, App. D.C., 357 A.2d 861 (1976); Moore v. United States, App. D.C., 359 A.2d 299 (1976); Brown v. United States, App. D.C., 359 A.2d 600 (1976); Terrell v. United States, App. D.C., 361 A.2d 207, cert. denied, 429 U.S. 984, 97 S. Ct. 501, 50 L. Ed. 2d 594 (1976); Watts v. United States, App. D.C., 362 A.2d 706 (1976); Poteat v. United States, App. D.C., 363 A.2d 295 (1976); Taylor v. United States, App. D.C., 366 A.2d 444 (1976); Harris v. United States, App. D.C., 366 A.2d 461 (1976); In re C.P.D., App. D.C., 367 A.2d 133 (1976); Fields v. United States, App. D.C., 368 A.2d 537 (1977); Cooper v. United States, App. D.C., 368 A.2d 554 (1977); Branch v. United States, App. D.C., 372 A.2d 998 (1977); Taylor v. United States, App. D.C., 372 A.2d 1009 (1977); Headen v. United States, App. D.C., 373 A.2d 599 (1977); Miles v. United States, App. D.C., 374 A.2d 278 (1977); Jenkins v. United States, App. D.C., 374 A.2d 581, cert. denied, 434 U.S. 894, 98 S. Ct. 274, 54 L. Ed. 2d 182 (1977); Grady v. United States, App. D.C., 376 A.2d 437 (1977); United States v. Harvey, App. D.C., 377 A.2d 411 (1977), rev'd on other grounds, App. D.C., 392 A.2d 1049 (1978); Jackson v. United States, App. D.C., 377 A.2d 1151 (1977); Chatman v. United States, App. D.C., 377 A.2d 1155 (1977); Nelson v. United States, App. D.C., 378 A.2d 657 (1977); Coleman v. United States, App. D.C., 379 A.2d 710 (1977); Adams v. United States, App. D.C., 379 A.2d 961 (1977); Judge v. United States, App. D.C., 379 A.2d 966 (1977); Whalen v. United States, App. D.C., 379 A.2d 1152 (1977), rev'd on other grounds, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980); Bridges v. United States, App. D.C., 381 A.2d 1073 (1977), cert. denied, 439 U.S. 842, 99 S. Ct. 135, 58 L. Ed. 2d 141 (1978); Thomas v. United States, App. D.C., 382 A.2d 24 (1978); Harling v. United States, App. D.C., 382 A.2d 845 (1978); Choco v. United States, App. D.C., 383 A.2d 333 (1978); Crowder v. United States, App. D.C., 383 A.2d 336 (1978); Crosby v. United States, App. D.C., 383 A.2d 351, cert. denied, 439 U.S. 849, 99 S. Ct. 152, 58 L. Ed. 2d 152 (1978); United States v. Pannell, App. D.C., 383 A.2d 1078 (1978); McDaniels v. United States, App. D.C., 385 A.2d 180 (1978); Wynn v. United States, App. D.C., 386 A.2d 695 (1978); Johnson v. United States, App. D.C., 387 A.2d 1108 (1978); Brown v. United States, App. D.C., 388 A.2d 451 (1978); Smith v. United States, App. D.C., 389 A.2d 1364 (1978); Ingram v. United States, App. D.C., 392 A.2d 505 (1978); Evans v. United States, App. D.C., 392 A.2d 1015 (1978); United States v. Harvey, App.

D.C., 392 A.2d 1049 (1978); Bridges v. United States, App. D.C., 392 A.2d 1053 (1978), cert. denied, 440 U.S. 938, 99 S. Ct. 1286, 59 L. Ed. 2d 498 (1979); Gilbert v. United States, App. D.C., 395 A.2d 1 (1978); Harvey v. United States, App. D.C., 395 A.2d 92 (1978), cert. denied, 441 U.S. 936, 99 S. Ct. 2061, 60 L. Ed. 2d 665 (1979); Johnson v. United States, App. D.C., 398 A.2d 354 (1979); In re R.A.B., App. D.C., 399 A.2d 81 (1979); Bennett v. United States, App. D.C., 400 A.2d 322 (1979); Bates v. United States, App. D.C., 403 A.2d 1159 (1979); Gaetano v. United States, App. D.C., 406 A.2d 1291 (1979); Daniel v. United States, App. D.C., 408 A.2d 1231 (1979); Hawkins v. United States, App. D.C., 411 A.2d 378 (1980); Williams v. United States, App. D.C., 412 A.2d 17 (1980); Powell v. United States, App. D.C., 414 A.2d 530 (1980); Cooper v. United States, App. D.C., 415 A.2d 528 (1980); Jones v. Jackson, App. D.C., 416 A.2d 249 (1980); Morrison v. United States, App. D.C., 417 A.2d 409 (1980); Dyson v. United States, App. D.C., 418 A.2d 127 (1980); White v. United States, App. D.C., 425 A.2d 616 (1980); Lorimer v. United States, App. D.C., 425 A.2d 1306 (1980); Murphy v. United States, 653 F.2d 637 (D.C. Cir. 1981); United States v. Luck, 664 F.2d 311 (D.C. Cir. 1981); United States v. Heldt, 668 F.2d 1238 (D.C. Cir. 1981), cert. denied, 456 U.S. 926, 102 S. Ct. 1971, 72 L. Ed. 2d 440 (1982); Carpenter v. United States, App. D.C., 430 A.2d 496, cert. denied, 454 U.S. 852, 102 S. Ct. 295, 70 L. Ed. 2d 143 (1981); Lewis v. United States, App. D.C., 430 A.2d 528, cert. denied, 454 U.S. 1081, 102 S. Ct. 635, 70 L. Ed. 2d 615 (1981); In re Inquiry into Cedar Knoll Inst., App. D.C., 430 A.2d 1087 (1981); Wilkerson v. United States, App. D.C., 432 A.2d 730, cert. denied, 454 U.S. 1090, 102 S. Ct. 654, 70 L. Ed. 2d 628 (1981); Samuels v. United States, App. D.C., 435 A.2d 392 (1981); Asbell v. United States, App. D.C., 436 A.2d 804 (1981); United States v. Green, 680 F.2d 183 (D.C. Cir. 1982), cert. denied, 459 U.S. 1210, 103 S. Ct. 1204, 75 L. Ed. 2d 445 (1983); United States v. Kember, 685 F.2d 451 (D.C. Cir.), cert. denied, 459 U.S. 832, 103 S. Ct. 73, 74 L. Ed. 2d 72 (1982); United States v. Mendelsohn, App. D.C., 443 A.2d 1311 (1982); Arnold v. United States, App. D.C., 443 A.2d 1318 (1982); Dyson v. United States, App. D.C., 450 A.2d 432 (1982); Keitt v. United States, App. D.C., 450 A.2d 461 (1982); Parks v. United States, App. D.C., 451 A.2d 591 (1982), cert. denied, 461 U.S. 945, 103 S. Ct. 2123, 77 L. Ed. 2d 1303 (1983); Howard v. United States, App. D.C., 452 A.2d 966 (1982), cert. denied, 460 U.S. 1087, 103 S. Ct. 1782, 76 L. Ed. 2d 352 (1983); Lee v. United States, App. D.C., 454 A.2d 770 (1982), cert. denied, 464 U.S. 972, 104 S. Ct. 409, 78 L. Ed. 2d 349 (1983); McClinnahan v. United States, App. D.C., 454 A.2d 1340 (1982), cert. denied, 464 U.S. 867, 104 S. Ct. 205, 78 L.

Ed. 2d 179 (1983); *Smith v. United States*, App. D.C., 454 A.2d 822 (1983); *Brown v. United States*, App. D.C., 464 A.2d 120 (1983); *In re C.Y.*, App. D.C., 466 A.2d 421 (1983); *Welch v. United States*, App. D.C., 466 A.2d 829 (1983); *United States v. Venable*, 111 WLR 2241 (Super. Ct. 1983); *Graves v. United States*, App. D.C., 467 A.2d 712 (1983); *Williams v. United States*, App. D.C., 470 A.2d 302 (1983), *aff'd* on rehearing, App. D.C., 485 A.2d 950, cert. denied, 472 U.S. 1019, 105 S. Ct. 3483, 87 L. Ed. 2d 617 (1985); *Sherer v. United States*, App. D.C., 470 A.2d 732 (1983); *Pennington v. United States*, App. D.C., 471 A.2d 250 (1983); *Graves v. United States*, App. D.C., 472 A.2d 395, cert. denied, 469 U.S. 846, 105 S. Ct. 158, 83 L. Ed. 2d 95 (1984); *Ray v. United States*, App. D.C., 472 A.2d 854 (1984); *Butler v. United States*, App. D.C., 481 A.2d 431 (1984), cert. denied, 470 U.S. 1029, 105 S. Ct. 1398, 84 L. Ed. 2d 786 (1985); *Jaggers v. United States*, App. D.C., 482 A.2d 786 (1984); *Moreno v. United States*, App. D.C., 482 A.2d 1233 (1984), cert. denied, 469 U.S. 1226, 105 S. Ct. 1222, 84 L. Ed. 2d 362 (1985); *Dumas v. United States*, App. D.C., 483 A.2d 301 (1984); *Byrd v. United States*, App. D.C., 485 A.2d 947 (1984); *Brooks v. United States*, App. D.C., 494 A.2d 922 (1984); *United States v. Bailey*, App. D.C., 495 A.2d 756 (1985); *Allen v. United States*, App. D.C., 495 A.2d 1145 (1985); *Tyler v. United States*, App. D.C., 495 A.2d 1180 (1985); *Artis v. United States*, App. D.C., 505 A.2d 52, cert. denied, 479 U.S. 964, 107 S. Ct. 464, 93 L. Ed. 2d 409 (1986); *Wright v. United States*, App. D.C., 508 A.2d 915 (1986); *Boswell v. United States*, App. D.C., 511 A.2d 29 (1986); *McKoy v. United States*, App. D.C., 518 A.2d 1013 (1986), cert. denied, 485 U.S. 907, 108 S. Ct. 1081, 99 L. Ed. 2d 240 (1988); *Kingsbury v. United States*, App. D.C., 520 A.2d 686 (1987); *Ross v. United States*, App. D.C., 520 A.2d 1064 (1987); *Watson v. United States*, App. D.C., 524 A.2d 736 (1987); *Waller v. United States*, App. D.C., 531 A.2d 994 (1987);

Jenkins v. United States, App. D.C., 548 A.2d 102 (1988); *Warrick v. United States*, App. D.C., 551 A.2d 1332 (1988); *Wright v. United States*, App. D.C., 564 A.2d 734 (1989); *Martin v. United States*, App. D.C., 567 A.2d 896 (1989); *Miles v. Rollins*, 733 F. Supp. 128 (D.D.C. 1990); *Ramos v. United States*, App. D.C., 569 A.2d 158 (1990); *Wright v. United States*, App. D.C., 570 A.2d 731 (1990); *Greene v. United States*, App. D.C., 571 A.2d 218 (1990); *Brown v. United States*, App. D.C., 576 A.2d 731 (1990); *Rice v. United States*, App. D.C., 580 A.2d 119 (1990); *James v. United States*, App. D.C., 580 A.2d 636 (1990); *Harper v. United States*, App. D.C., 582 A.2d 485 (1990); *Holland v. United States*, App. D.C., 584 A.2d 13 (1990); *Norris v. United States*, App. D.C., 585 A.2d 1372 (1991); *Russell v. United States*, App. D.C., 586 A.2d 695 (1991); *Kelly v. United States*, App. D.C., 590 A.2d 1031 (1991); *McGrier v. United States*, App. D.C., 597 A.2d 36 (1991); *Brooks v. United States*, App. D.C., 599 A.2d 1094 (1991); *Nelson v. United States*, App. D.C., 601 A.2d 582 (1991); *Bean v. United States*, App. D.C., 606 A.2d 770 (1992); *McFadden v. United States*, App. D.C., 614 A.2d 11 (1992); *Halicki v. United States*, App. D.C., 614 A.2d 499 (1992); *Applewhite v. United States*, App. D.C., 614 A.2d 888 (1992); *Farmer v. United States*, App. D.C., 616 A.2d 1241 (1992), cert. denied, — U.S. —, 113 S. Ct. 1958, 123 L. Ed. 2d 661 (1993); *Eldridge v. United States*, App. D.C., 618 A.2d 690 (1992); *Coleman v. United States*, App. D.C., 619 A.2d 40 (1993); *Dickerson v. United States*, App. D.C., 620 A.2d 270 (1993); *Mitchell v. United States*, App. D.C., 629 A.2d 10 (1993), cert. denied, — U.S. —, 114 S. Ct. 1119, 127 L. Ed. 2d 429 (1994); *Poole v. United States*, App. D.C., 630 A.2d 1109 (1993), cert. denied, — U.S. —, 115 S. Ct. 160, 130 L. Ed. 2d 98 (1994); *Young v. United States*, App. D.C., 639 A.2d 92 (1994); *Ulmer v. United States*, App. D.C., 649 A.2d 295 (1994); *Butler v. United States*, App. D.C., 649 A.2d 563 (1994).

CHAPTER 19. INCEST.

Sec.

22-1901. Definition and penalty.

§ 22-1901. Definition and penalty.

If any person in the District related to another person within and not including the fourth degree of consanguinity, computed according to the rules of the Roman or civil law, shall marry or cohabit with or have sexual intercourse with such other so-related person, knowing him or her to be within said degree of relationship, the person so offending shall be deemed guilty of incest, and, on conviction thereof, shall be punished by imprisonment for not more than 12 years. (Mar. 3, 1901, 31 Stat. 1332, ch. 854, § 875; 1973 Ed., § 22-1901.)

Elements. — The crime of incest involves the same bodily invasion as that of rape, but also requires 2 additional elements: (1) That the victim was related to the defendant within the specified degree of consanguinity; and (2) that the defendant knew the victim was so related at the time of sexual intercourse. *Robinson v. United States*, App. D.C., 452 A.2d 354 (1982).

No showing required that act committed forcibly or against will of complainant. — Lacking from the elements of incest but required for rape is a showing that the act was committed forcibly and against the will of the complaining witness. *Robinson v. United States*, App. D.C., 452 A.2d 354 (1982).

Corroboration not required where victim is mature female. — Corroboration is not required in prosecutions for incest where the victim is a mature female. *Robinson v. United States*, App. D.C., 452 A.2d 354 (1982).

Neither rape nor carnal knowledge is lesser included offense of incest. — The elements of the offenses of rape and incest are not the same, and each requires proof of one or more elements that the other does not. Furthermore, since incest requires proof of a familial

relationship that carnal knowledge does not, and carnal knowledge imposes an age requirement that incest does not, those two offenses do not merge. *Pounds v. United States*, App. D.C., 529 A.2d 791 (1987).

History of sexual abuse admissible. — In prosecutions for sexual offenses, evidence of a history of sexual abuse of the complainant by the defendant may be admissible on the theory of predisposition to gratify special desires with that particular victim. *Pounds v. United States*, App. D.C., 529 A.2d 791 (1987).

View of premises not required. — In a prosecution for incest, a refusal to grant the defendant's motion for a view of the premises is not an abuse of discretion. *Hodge v. United States*, 126 F.2d 849 (D.C. Cir. 1942).

Neither is instruction on reputation where subject adequately covered. — In a prosecution for incest, a refusal to give a prayer requested by the defendant which concerns reputation is not an error where the subject has been adequately covered in an instruction given. *Hodge v. United States*, 126 F.2d 849 (D.C. Cir. 1942).

Cited in *Tatem v. United States*, 275 F.2d 894 (D.C. Cir. 1960).

CHAPTER 20. OBSCENITY.

*Subchapter I. General Provisions.**Subchapter II. Sexual Performances Using Minors.*

Sec.

22-2001. Certain obscene activities and conduct declared unlawful; definitions; penalties; affirmative defenses; exception.

Sec.

22-2011. Definitions.
 22-2012. Prohibited acts.
 22-2013. Penalties.
 22-2014. Affirmative defenses.

Subchapter I. General Provisions.

Editor's notes. — Because of the codification of D.C. Law 4-173 as subchapter II of this chapter, the preexisting text of Chapter 20, to

include § 22-2001, has been designated as subchapter I of this chapter.

§ 22-2001. Certain obscene activities and conduct declared unlawful; definitions; penalties; affirmative defenses; exception.

(a)(1) It shall be unlawful in the District of Columbia for a person knowingly:

(A) To sell, deliver, distribute, or provide, or offer or agree to sell, deliver, distribute, or provide any obscene, indecent, or filthy writing, picture, sound recording, or other article or representation;

(B) To present, direct, act in, or otherwise participate in the preparation or presentation of, any obscene, indecent, or filthy play, dance, motion picture, or other performance;

(C) To pose for, model for, print, record, compose, edit, write, publish, or otherwise participate in preparing for publication, exhibition, or sale, any obscene, indecent, or filthy writing, picture, sound recording, or other article or representation;

(D) To sell, deliver, distribute, or provide, or offer or agree to sell, deliver, distribute or provide any article, thing, or device which is intended for or represented as being for indecent or immoral use;

(E) To create, buy, procure, or possess any matter described in the preceding subparagraphs of this paragraph with intent to disseminate such matter in violation of this subsection;

(F) To advertise or otherwise promote the sale of any matter described in the preceding subparagraphs of this paragraph; or

(G) To advertise or otherwise promote the sale of material represented or held out by such person to be obscene.

(2)(A) For purposes of subparagraph (E) of paragraph (1) of this subsection, the creation, purchase, procurement, or possession of a mold, engraved plate, or other embodiment of obscenity specially adapted for reproducing multiple copies or the possession of more than 3 copies, of obscene, indecent, or

filthy material shall be prima facie evidence of an intent to disseminate such material in violation of this subsection.

(B) For purposes of paragraph (1) of this subsection, the term “knowingly” means having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry of, the character and content of any article, thing, device, performance, or representation described in paragraph (1) of this subsection which is reasonably susceptible of examination.

(3) When any person is convicted of a violation of this subsection, the court in its judgment of conviction may, in addition to the penalty prescribed, order the confiscation and disposal of any materials described in paragraph (1) of this subsection, which were named in the charge against such person and which were found in the possession or under the control of such person at the time of such person’s arrest.

(b)(1) It shall be unlawful in the District of Columbia for any person knowingly:

(A) To sell, deliver, distribute, or provide, or offer or agree to sell, deliver, distribute, or provide to a minor:

(i) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body, which depicts nudity, sexual conduct, or sado-masochistic abuse and which taken as a whole is patently offensive because it affronts prevailing standards in the adult community as a whole with respect to what is suitable material for minors; or

(ii) Any book, magazine, or other printed matter however reproduced or sound recording, which depicts nudity, sexual conduct, or sado-masochistic abuse or which contains explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct, or sado-masochistic abuse and which taken as a whole is patently offensive because it affronts prevailing standards in the adult community as a whole with respect to what is suitable material for minors; or

(B) To exhibit to a minor, or to sell or provide to a minor an admission ticket to, or pass to, or to admit a minor to, premises whereon there is exhibited, a motion picture, show, or other presentation which, in whole or in part, depicts nudity, sexual conduct, or sado-masochistic abuse and which taken as a whole is patently offensive because it affronts prevailing standards in the adult community as a whole with respect to what is suitable material for minors.

(2) For purposes of paragraph (1) of this subsection:

(A) The term “minor” means any person under the age of 17 years.

(B) The term “nudity” includes the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a full opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(C) The term “sexual conduct” includes acts of sodomy, masturbation, homosexuality, sexual intercourse, or physical contact with a person’s clothed

or unclothed genitals, pubic area, buttocks, or, if such person be a female, breast.

(D) The term "sexual excitement" includes the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(E) The term "sado-masochistic abuse" includes flagellation or torture by or upon a person clad in undergarments or a mask or bizarre costume, or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed.

(F) The term "knowingly" means having a general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry or both of:

(i) The character and content of any material described in paragraph (1) of this subsection which is reasonably susceptible of examination by the defendant; and

(ii) The age of the minor.

(c) It shall be an affirmative defense to a charge of violating subsection (a) or (b) of this section that the dissemination was to institutions or individuals having scientific, educational, or other special justification for possession of such material.

(d) Nothing in this section shall apply to a licensee under the Communications Act of 1934 (47 U.S.C. § 151 et seq.) while engaged in activities regulated pursuant to such Act.

(e) A person convicted of violating subsection (a) or (b) of this section shall for the 1st offense be fined not more than \$1,000 or imprisoned not more than 180 days, or both. A person convicted of a 2nd or subsequent offense under subsection (a) or (b) of this section shall be fined not less than \$1,000 nor more than \$5,000 or imprisoned not less than 6 months or more than 3 years, or both. (Mar. 3, 1901, 31 Stat. 1332, ch. 854, § 872; Dec. 27, 1967, 81 Stat. 738, Pub. L. 90-226, title VI, § 606; 1973 Ed., § 22-2001; May 21, 1994, D.C. Law 10-119, § 2(p), 41 DCR 1639; Aug. 20, 1994, D.C. Law 10-151, § 105(m), 41 DCR 2608.)

Cross references. — As to obscene or harassing telephone calls under the Federal Communications Act, see 47 U.S.C. § 223.

As to age of majority, see note following § 21-101.

As to lewd, indecent or obscene acts, see § 22-1112.

Section references. — This section is referred to in § 43-1847.

Effect of amendments. — D.C. Law 10-119 substituted "such person's" for "his" in (a)(3).

D.C. Law 10-151 substituted "\$1,000 or imprisoned not more than 180 days" for "\$3,000 or imprisoned not more than 1 year" in the first sentence of (e).

Emergency act amendments. — For temporary amendment of section, see § 105(m) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-119. — Law

10-119, the "Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Legislative history of Law 10-151. — Law 10-151, the "Omnibus Criminal Justice Reform Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C.

Law 10-151 became effective on August 20, 1994.

Video arcade regulations amended. — Section 2 of D.C. Law 5-88 amends the regulations governing video arcades and mechanical amusement machines which prohibit the use or display of machines displaying specified sexual activities or anatomical areas on premises open to persons under 18.

Delegation of authority under D.C. Law 5-88. — See Mayor's Order 85-28, March 11, 1985.

Constitutionality. — No merit exists in the contention that this section, as construed and interpreted, countervenes the First and Fifth Amendments. *Benjamin v. United States*, App. D.C., 74 A.2d 64 (1950).

This section, as applied to motion picture films, is not invalid for vagueness. *Retzer v. United States*, App. D.C., 363 A.2d 307 (1976).

Proper construction. — This section uses language similar to that used in the federal statutes and is to be given the same construction. *United States v. Sherpix, Inc.*, 512 F.2d 1361 (D.C. Cir. 1975).

Word "obscene" varies in meaning from time to time as the general notions of decency in attire and conduct of exhibitions for public entertainment tend to change. *Hudson v. United States*, App. D.C., 234 A.2d 903 (1967).

Elements which must be proved before material or performance can be found obscene are: (1) An appeal to a prurient interest in sex; (2) utterly no redeeming social value; and (3) a violation of contemporary national community standards. *Hermann v. United States*, App. D.C., 304 A.2d 22 (1973).

Proper reference for community standards. — In the District, community standards in obscenity cases shall be determined by a reference to contemporary community standards in the nation as a whole. *Hudson v. United States*, App. D.C., 234 A.2d 903 (1967).

Roth-Memoirs test of obscenity is not constitutionally infirm. *Lakin v. United States*, App. D.C., 363 A.2d 990 (1976).

Application of Miller guidelines to pre-Miller conduct. — Retroactive application of the Miller obscenity guidelines to pre-Miller conduct does not deprive defendants of due process nor violate the constitutional prohibition against ex post facto laws. *Lakin v. United States*, App. D.C., 363 A.2d 990 (1976).

Where test changes between offense and trial, both tests apply. — Where at the time of the distribution and exhibition of an allegedly obscene film the judicially declared test of obscenity was whether the material is utterly without redeeming social value but, at the time of trial the test requires only that the material lack serious literary, artistic, political or scientific value, the defendants can be convicted only if the material is found to be obscene under

both tests. *United States v. Sherpix, Inc.*, 512 F.2d 1361 (D.C. Cir. 1975).

Guilty knowledge must be alleged and proved. *Moens v. United States*, 267 F. 317 (D.C. Cir. 1920).

No proof needed of knowledge of contents. — For a salesman to be convicted of knowingly selling an obscene film, the government need not prove that the salesman had actual knowledge of the contents of the particular film sold. *Kramer v. United States*, App. D.C., 293 A.2d 272 (1972).

Nor of community standards. — The Constitution and this section do not mandate proof of knowledge of contemporary community standards. *Lakin v. United States*, App. D.C., 363 A.2d 990 (1976).

Personal opinion or belief irrelevant. — Congress did not intend that the question of the obscenity of the performance should depend upon the opinion or belief of the person who, with knowledge or notice of the acts in question, assumed the responsibility for putting on the performance. *Morris v. United States*, App. D.C., 259 A.2d 337 (1969).

If the defendants knew what they were doing, their personal belief that they were not violating the law is no defense. *Huffman v. United States*, App. D.C., 259 A.2d 342 (1969), *aff'd*, 470 F.2d 386 (D.C. Cir. 1971), *rev'd* on other grounds on rehearing, 502 F.2d 419 (D.C. Cir. 1974).

Criminal intent in exhibiting obscene pictures will be implied from guilty knowledge of their nature. *Moens v. United States*, 267 F. 317 (D.C. Cir. 1920).

"Constructive" knowledge of obscenity sufficient. — This section requires no more than that the accused has a sufficient knowledge of the allegedly obscene performance to suspect its impropriety and inspect or inquire as to its character and content. *Morris v. United States*, App. D.C., 259 A.2d 337 (1969).

This section allows the accused to remain ignorant of the illegality of the performance only at his peril, once he knows or has reason to know that it might be a violation. *Morris v. United States*, App. D.C., 259 A.2d 337 (1969).

Theater manager's burden of ascertaining obscene performance. — Where the manager of a theater, knows, or has reasonable opportunity to know the character and content of the performer's act, he has the burden of ascertaining whether the performance might be obscene. *Morris v. United States*, App. D.C., 259 A.2d 337 (1969).

Advice from counsel is excludable evidence. — The judge properly excluded testimony that the defendant received advice from his counsel that the allegedly obscene material could be legally sold. *Huffman v. United States*, App. D.C., 259 A.2d 342 (1969), *aff'd*, 470 F.2d

386 (D.C. Cir. 1971), rev'd on other grounds on rehearing, 502 F.2d 419 (D.C. Cir. 1974).

Salesman charged with familiarity with goods. — It will not be presumed that even a new salesman is completely unfamiliar with the goods he is hired to sell in an adult book and magazine store, especially where he indicates he has actual knowledge of the nature of the particular merchandise. *Kramer v. United States*, App. D.C., 293 A.2d 272 (1972).

Performer charged with knowledge. — The performer of an allegedly obscene act knows or should know that her performance might violate this section. *Morris v. United States*, App. D.C., 259 A.2d 337 (1969).

Planned gift constitutes intent to disseminate. — There is no immunity from a prosecution for possessing obscene matter with intent to disseminate where the only dissemination planned is a gift to another. *United States v. Pryba*, 502 F.2d 391 (D.C. Cir. 1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 815, 42 L. Ed. 2d 828 (1975).

Ex parte seizure allowed. — Based on an ex parte hearing, the court may issue an order authorizing the seizure of a limited number of allegedly obscene publications for use as evidence in a criminal prosecution. *United States v. Green*, App. D.C., 284 A.2d 879 (1971).

Ex parte hearings may be used to grant a warrant which authorizes the seizure of limited amounts of alleged obscene materials. *Huffman v. United States*, 502 F.2d 419 (D.C. Cir. 1974).

But unconstitutional where confiscation massive. — In the absence of a prior adversary determination of obscenity, a massive confiscatory seizure of alleged obscene publications or motion picture films runs afoul of the First Amendment. *United States v. Green*, App. D.C., 284 A.2d 879 (1971).

Magistrate's probable cause determination to seize obscene film is entitled to great deference. *United States v. Sherpix, Inc.*, 512 F.2d 1361 (D.C. Cir. 1975).

Defendant entitled to oppose claim following seizure. — Promptly after the execution of a warrant issued ex parte, the defendant must be afforded an opportunity to oppose the government's obscenity claim. *United States v. Pryba*, 502 F.2d 391 (D.C. Cir. 1974), cert. denied, 419 U.S. 1127, 95 S. Ct. 815, 42 L. Ed. 2d 828 (1975).

Absence of probable cause leads to suppression of evidence. — Where an affidavit is not sufficient to show probable cause for issuing a search warrant and the resulting search of a store is illegal, the evidence procured should be suppressed in any subsequent prosecution for possessing, with intent to sell, lewd and obscene photographs, films, and literature. *Lerner v. United States*, App. D.C., 151 A.2d 184 (1959).

Factors leading to refusal to grant bill of particulars. — The refusal to grant a bill of particulars is not an abuse of discretion where the information refers with specificity to the time and place of the allegedly obscene performance and where the defendant reveals a complete familiarity with the act charged. *Yankovitz v. United States*, App. D.C., 182 A.2d 889 (1962), overruled on other grounds, *Hudson v. United States*, App. D.C., 234 A.2d 903 (1967).

Factors leading to consolidation of charges. — Separate informations can be combined for trial, where there are separate allegedly obscene acts, each of which involves the elements essential to support a violation. *Yankovitz v. United States*, App. D.C., 182 A.2d 889 (1962), overruled on other grounds, *Hudson v. United States*, App. D.C., 234 A.2d 903 (1967).

Public trial not denied by excluding public from seeing film. — The right to a public trial is not denied where, when the alleged obscene film is shown in court, the public, except newspaper reporters, is excluded. *Lancaster v. United States*, 293 F.2d 519 (D.C. Cir. 1961).

Question of national standards of obscenity is a matter of proof at trial. *Hermann v. United States*, App. D.C., 304 A.2d 22 (1973).

And government required to offer evidence to prove standards. — In an obscenity case involving the question of whether a local show is obscene, the government is required to offer competent evidence to prove the relevant community standards prevailing in the nation generally. *Hudson v. United States*, App. D.C., 234 A.2d 903 (1967).

Except in cases of obscenity per se. — Obscenity per se relieves the government from offering any evidence of community standards in order to make a prima facie case. *Hermann v. United States*, App. D.C., 304 A.2d 22 (1973).

But defense allowed to offer evidence on standards. — When obscenity per se is involved, the prosecution is not required to offer any evidence, beyond the material itself, that the material is pornographic or obscene or that it is below community standards, but the defense is allowed to offer evidence of community standard to prove that the material is not obscene. *Wilhoit v. United States*, App. D.C., 279 A.2d 505, cert. denied, 404 U.S. 994, 92 S. Ct. 538, 30 L. Ed. 2d 546 (1971).

Where there is a ruling of obscenity per se, the defense is entitled to offer evidence of community standards to prove that the material or performance is not obscene. *Morris v. United States*, App. D.C., 259 A.2d 337 (1969).

And government still possesses burden of proof. — Where rebutting evidence has been introduced by the defendant as to the

obscenity of films, a ruling of obscenity per se does not relieve the government of its burden of going forward, nor of its burden of proof beyond a reasonable doubt, on all elements of the obscenity test. *Parks v. United States*, App. D.C., 294 A.2d 858 (1972).

Once defense presents views, burden of proceeding shifts to government. — Where the government rests after the court views the allegedly obscene material, and expert witness for the defense then expresses their opinion on contemporary community standards, the burden of proceeding shifts back to the government to prove beyond a reasonable doubt a violation of contemporary community standards. *Hermann v. United States*, App. D.C., 304 A.2d 22 (1973).

Expert testimony is not required as a matter of course to establish the elements on which material or a performance can be judged obscene. *Hermann v. United States*, App. D.C., 304 A.2d 22 (1973).

And court does not err in excluding testimony of expert witnesses on community standards, as the subject of obscenity is not beyond the ken of the average layman. *Fennekohl v. United States*, App. D.C., 354 A.2d 238 (1976).

But summary exclusion of all expert testimony inappropriate. — The defense should be free to introduce appropriate expert testimony; the summary exclusion of all testimony on community standards is thus inappropriate. *United States v. Sherpix, Inc.*, 512 F.2d 1361 (D.C. Cir. 1975).

Grand jury testimony must be produced upon inconsistencies in identifications. — Where there is ample ground for suspicion of inconsistencies in a key eyewitness' identification, the judge abuses his discretion in failing to order a production of the witness' grand jury testimony. *De Binder v. United States*, 292 F.2d 737 (D.C. Cir. 1961).

It is for the trier of fact to weigh the conflicting evidence as to an alleged violation of community standards. *Parks v. United States*, App. D.C., 294 A.2d 858 (1972).

Issue of obscenity is for the jury and judge's comments on the evidence are not binding. *Heinecke v. United States*, 294 F.2d 727 (D.C. Cir.), cert. denied, 368 U.S. 901, 82 S. Ct. 173, 7 L. Ed. 2d 96 (1961).

Proper instruction on patent offensiveness. — The jury must be instructed that it is its task, as the surrogate for the community, to determine whether there is a depiction of sexual conduct to a point of patent offensiveness. *Huffman v. United States*, 502 F.2d 419 (D.C. Cir. 1974).

Conduct and material adjudged obscene. — A reasonable man can only conclude that an act simulating fellatio and intentional exposure of the vaginal area is obscene per se. *Morris v. United States*, App. D.C., 259 A.2d 337 (1969).

A book containing photographs, depicting male and female genitalia as they are involved in deviant sexual practices, with chapters of text consisting of a series of narratives of dealing with the entire gamut of perversion is pornographic. *Wilhoit v. United States*, App. D.C., 279 A.2d 505, cert. denied, 404 U.S. 994, 92 S. Ct. 538, 30 L. Ed. 2d 546 (1971).

Photographs depicting numerous homosexual acts, including anal intercourse, fellatio, masturbation and oral-anal activity, all in a variety of positions, accompanied by a text which is an account of aberrant homosexual acts, all of which is made available to the general public over the age of majority, is obscene. *Lakin v. United States*, App. D.C., 363 A.2d 990 (1976).

In obscenity cases, the reviewing court is required to make an independent judgment as to whether the material in question is, as matter of law, obscene and beyond the perimeter of constitutional protection. *Wilhoit v. United States*, App. D.C., 279 A.2d 505, cert. denied, 404 U.S. 994, 92 S. Ct. 538, 30 L. Ed. 2d 546 (1971).

Appellate court reviews the evidence de novo in a prosecution under this section. *Morris v. United States*, App. D.C., 259 A.2d 337 (1969).

Appellate court can sustain finding of guilty without describing the allegedly obscene materials. *Benjamin v. United States*, App. D.C., 74 A.2d 64 (1950).

But cannot reduce sentence absent abuse of discretion. — An appellate court cannot reduce a sentence under this section in the absence of a showing of an abuse of discretion on the part of the lower court. *Hankins v. United States*, App. D.C., 120 A.2d 590 (1956).

Subchapter II. Sexual Performances Using Minors.

§ 22-2011. Definitions.

For the purposes of this subchapter, the term:

(1) "Knowingly" means having general knowledge of, or reason to know or a belief or ground for belief which warrants further inspection or inquiry, or both.

(2) “Minor” means any person under 16 years of age.

(3) “Performance” means any play, motion picture, photograph, electronic representation, dance, or any other visual presentation or exhibition.

(4) “Promote” means to procure, manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish or distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do the same.

(5) “Sexual conduct” means:

(A) Actual or simulated sexual intercourse:

(i) Between the penis and the vulva, anus, or mouth;

(ii) Between the mouth and the vulva or anus; or

(iii) Between an artificial sexual organ or other object or instrument used in the manner of an artificial sexual organ and the anus or vulva;

(B) Masturbation;

(C) Sexual bestiality;

(D) Sadoomasochistic sexual activity for the purpose of sexual stimulation; or

(E) Lewd exhibition of the genitals.

(6) “Sexual performance” means any performance or part thereof which includes sexual conduct by a person under 16 years of age. (Mar. 9, 1983, D.C. Law 4-173, § 2, 29 DCR 5749.)

Cross references. — As to exception of child witness’ testimony from corroboration requirement, see § 23-114.

Section references. — This section is referred to in § 6-2501.

Legislative history of Law 4-173. — Law 4-173, the “District of Columbia Protection of Minors Act of 1982,” was introduced in Council

and assigned Bill No. 4-305, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on October 19, 1982, and November 16, 1982, respectively. Signed by the Mayor on December 8, 1982, it was assigned Act No. 4-256 and transmitted to both Houses of Congress for its review.

§ 22-2012. Prohibited acts.

It shall be unlawful in the District of Columbia for a person knowingly to use a minor in a sexual performance or to promote a sexual performance by a minor.

(1) A person is guilty of the use of a minor in a sexual performance if knowing the character and content thereof, he or she employs, authorizes, or induces a person under 16 years of age to engage in a sexual performance or being the parent, legal guardian, or custodian of a minor, he or she consents to the participation by a minor in a sexual performance.

(2) A person is guilty of promoting a sexual performance by a minor when, knowing the character and content thereof, he or she produces, directs, or promotes any performance which includes sexual conduct by a person under 16 years of age. (Mar. 9, 1983, D.C. Law 4-173, § 3, 29 DCR 5749.)

Section references. — This section is referred to in § 22-2014.

Legislative history of Law 4-173. — See note to § 22-2011.

Lesser included offenses. — Taking indecent liberties with a minor, under former § 22-3501(a), was a lesser included offense of assault with intent to commit carnal knowledge. But a greater and a lesser offense will merge only if they both stem from a single criminal act, or if the lesser is committed in order to affect the greater. *Spain v. United States*, 665 A.2d 658 (D.C. App. 1995).

No merger of offenses where acts sepa-

rated by new criminal impulse. — Assault with intent to commit carnal knowledge and taking indecent liberties with a minor child, under former § 22-3501(a), did not merge into one offense because a new criminal impulse separated the two; court did not err in allowing the jury to treat them as two separate offenses and in finding defendant guilty of both. *Spain v. United States*, 665 A.2d 658 (D.C. App. 1995).

§ 22-2013. Penalties.

Violation of this subchapter shall be a felony and shall be punished by:

(1) A fine of not more than \$5,000 or imprisonment for not more than 10 years, or both for the first offense; or

(2) A fine of not more than \$15,000 or imprisonment for not more than 20 years, or both for the 2nd and each subsequent offense. (Mar. 9, 1983, D.C. Law 4-173, § 4, 29 DCR 5749.)

Legislative history of Law 4-173. — See note to § 22-2011.

§ 22-2014. Affirmative defenses.

(a) Under this subchapter it shall be an affirmative defense that the defendant in good faith reasonably believed the person appearing in the performance was 16 years of age or over.

(b)(1) Except as provided in paragraph (2) of this subsection, in any prosecution for an offense pursuant to § 22-2012 (2) it shall be an affirmative defense that the person so charged was:

(A) A librarian engaged in the normal course of his or her employment; or

(B) A motion picture projectionist, stage employee or spotlight operator, cashier, doorman, usher, candy stand attendant, porter, or in any other nonmanagerial or nonsupervisory capacity in a motion picture theater.

(2) The affirmative defense provided by paragraph (1) of this subsection shall not apply if the person described therein has a financial interest (other than his or her employment, which employment does not encompass compensation based upon any proportion of the gross receipts) in:

(A) The promotion of a sexual performance for sale, rental, or exhibition;

(B) The direction of any sexual performance; or

(C) The acquisition of the performance for sale, retail, or exhibition. (Mar. 9, 1983, D.C. Law 4-173, § 5, 29 DCR 5749.)

Legislative history of Law 4-173. — See note to § 22-2011.

First amendment rights. — Pro se complaint, generously read, could have been construed to assert violations of alleged First Amendment right to a judicial determination of

the legality of disputed photographs and negatives prior to destruction, and an alleged due process right to a hearing within a reasonable time after seizure of the property. *Johnson v. Gibson*, 14 F.3d 61 (D.C. Cir.), cert. denied, — U.S. —, 115 S. Ct. 70, 130 L. Ed. 2d 26 (1994).

CHAPTER 21. KIDNAPPING.

Sec.

22-2101. Definition and penalty; conspiracy.

§ 22-2101. Definition and penalty; conspiracy.

Whoever shall be guilty of, or of aiding or abetting in, seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, or carrying away any individual by any means whatsoever, and holding or detaining, or with the intent to hold or detain, such individual for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction thereof, be punished by imprisonment for life or for such term as the court in its discretion may determine. This section shall be held to have been violated if either the seizing, confining, inveigling, enticing, decoying, kidnapping, abducting, concealing, carrying away, holding, or detaining occurs in the District of Columbia. If 2 or more individuals enter into any agreement or conspiracy to do any act or acts which would constitute a violation of the provisions of this section, and 1 or more of such individuals do any act to effect the object of such agreement or conspiracy, each such individual shall be deemed to have violated the provisions of this section. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 812; Feb. 18, 1933, 47 Stat. 858, ch. 103; Nov. 8, 1965, 79 Stat. 1307, Pub. L. 89-347, § 3; 1973 Ed., § 22-2101.)

Cross references. — As to additional penalty for committing crime when armed, see §§ 22-3201 and 22-3202.

Section references. — This section is referred to in §§ 11-502 and 23-546.

Section is neither unconstitutionally vague, nor is it an ex post facto law. *Khaalis v. United States*, App. D.C., 408 A.2d 313 (1979), cert. denied, 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781 (1980).

Broad application. — The insertion into this section of the words “or otherwise” indicates a congressional intent that the statute be given a broad application. *Walker v. United States*, App. D.C., 617 A.2d 525 (1992).

The phrase “or otherwise” is to be construed broadly. *Dade v. United States*, App. D.C., 663 A.2d 547 (1995).

Purpose of detention. — Detention may be for any purpose that the defendant believes might benefit him. *Davis v. United States*, App. D.C., 613 A.2d 906 (1992); *Dade v. United States*, App. D.C., 663 A.2d 547 (1995).

There being ample evidence that defendant was motivated by revenge, the evidence was sufficient to convict him under this section. *Walker v. United States*, App. D.C., 617 A.2d 525 (1992).

Involuntary nature of seizure and detention is essence of crime of kidnapping. *Head v. United States*, App. D.C., 451 A.2d 615 (1982); *Butler v. United States*, App. D.C., 614

A.2d 875, cert. denied, 506 U.S. 1009, 113 S. Ct. 625, 121 L. Ed. 2d 558 (1992).

Secrecy is not an element of kidnapping, either at common law nor under this section. *Khaalis v. United States*, App. D.C., 408 A.2d 313 (1979), cert. denied, 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781 (1980).

Asportation is not an essential element of kidnapping under this section. *Khaalis v. United States*, App. D.C., 408 A.2d 313 (1979), cert. denied, 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781 (1980); *Butler v. United States*, App. D.C., 614 A.2d 875, cert. denied, 506 U.S. 1009, 113 S. Ct. 625, 121 L. Ed. 2d 558 (1992).

Section conforms with federal act. (18 U.S.C. § 1201) defining kidnapping; consequently, decisions of United States courts provide authoritative guidelines for interpretation of this section. *Sinclair v. United States*, App. D.C., 388 A.2d 1201 (1978), cert. denied, 439 U.S. 1118, 99 S. Ct. 1026, 59 L. Ed. 2d 77 (1979).

But convictions under statutes independent of each other. — The possibility of conviction under this section is not relevant to a consideration of guilt under the federal kidnapping statute. *Matthews v. United States*, 449 F.2d 985 (D.C. Cir. 1971).

Elements necessary for parental kidnapping conviction. — In no case, in the absence of an express provision of statute, can a parent be guilty of kidnapping his or her own

minor child, unless the forcible taking is from the custody established by the decree of a competent court. *Hard v. Splain*, 45 App. D.C. 1 (1916).

Showing required for armed kidnapping conviction. — The elements of armed kidnapping require, among other things, a showing that the accused, while armed, seized or detained the victim. *Head v. United States*, App. D.C., 451 A.2d 615 (1982).

Police sketches reliable tools to establish probable cause. — Police sketches based on information communicated directly to the artist by the victim and criticized and approved by the victim before use are reliable and useful tools to establish probable cause. *Davis v. United States*, App. D.C., 367 A.2d 1254 (1976), cert. denied, 434 U.S. 847, 98 S. Ct. 154, 54 L. Ed. 2d 114 (1977).

Venue change denied where jury not fixed by publicity. — Where it is possible to get a jury which has not been fixed by extensive pretrial publicity concerning a kidnapping offense there is no error in refusing to grant a change-of-venue motion. *United States v. Wilkerson*, 548 F.2d 970 (D.C. Cir. 1976).

Refusal to sever counts. — In a prosecution for various offenses, including kidnapping, the court does not err in refusing to sever the counts on the basis of separate dates of the alleged offenses where all the offenses flow from the other, evidence of each would be admissible in separate trials to show motive, intent and identity and evidence as to each is simple and direct. *Horton v. United States*, App. D.C., 377 A.2d 390 (1977).

Detention or confinement may merge with principal crime. — The detention or confinement of the victim in crimes such as rape, robbery and assault, if approximately coextensive in time and place with the crime itself, is an integral element of the crime, and like an attempt or a necessarily included lesser offense, it merges with the principal offense in contradistinction to constituting a separate crime. *Sinclair v. United States*, App. D.C., 388 A.2d 1201 (1978), cert. denied, 439 U.S. 1118, 99 S. Ct. 1026, 59 L. Ed. 2d 77 (1979).

The detention, coercion, or confinement which is an integral part of every rape cannot support a separate conviction for kidnapping. *Smothers v. United States*, App. D.C., 403 A.2d 306 (1979).

Or may constitute separate act of kidnapping. — Where pursuant to a crime such as rape, robbery or assault the victim is subjected to substantial acts of confinement or forcible transportation, the doctrine of merger cannot be used to treat such acts as mere incidents of the principal crime; rather the intent and text of this section require that such acts be treated as separate acts of kidnapping. *Sinclair v. United States*, App. D.C., 388 A.2d

1201 (1978), cert. denied, 439 U.S. 1118, 99 S. Ct. 1026, 59 L. Ed. 2d 77 (1979).

The fact that there may have been a subsequent robbery and rape does not negate a kidnapping. *Beck v. United States*, App. D.C., 402 A.2d 418 (1979).

Kidnapping charge did not merge with rape and robbery convictions. — The trial court was correct in refusing to merge the kidnapping into the rape and robbery convictions, where the facts warranted a conclusion that the seizure exceeded that incidental to the rape or robbery and both temporally and in kind was more than approximately coextensive with the underlying incidents themselves. *West v. United States*, App. D.C., 599 A.2d 788 (1991).

Kidnapping did not merge with underlying assault with intent to kill. — Kidnapping was not merely an incident of the assault with intent to kill, and did not merge with the underlying assault, where the defendant initially tried to kill the victim, but having failed in this attempt, seized the victim's keys, opened the trunk of the victim's car, and demanded that the victim climb in, so that assault ended before the kidnapping even began. *Nelson v. United States*, App. D.C., 601 A.2d 582 (1991).

Conviction for assault with a dangerous weapon did not merge into convictions for assault with intent to kidnap while armed. When the plan to kidnap the victim went sour, and the victim broke free and ran, the offense of assault on the victim with intent to kidnap while armed had ended and the subsequent shooting of the victim invaded a separate interest, and thus constituted a separate offense. *United States v. Rodriguez*, 115 WLR 2729 (Super. Ct.).

Depending upon facts of case. — Congress did not intend that every person who commits a rape be also charged and convicted of kidnapping, with its generally more severe penal consequences; rather the facts of each case must be examined to determine whether in fact 2 separate crimes were committed or whether they merged. *Robinson v. United States*, App. D.C., 388 A.2d 1210 (1978).

In determining whether the separate crimes of rape and kidnapping should be merged, courts will inquire whether the asportation (or seizure) in a given case was of the type incidental to every rape or whether the confinement and restraint were significant enough of themselves to warrant an independent prosecution for kidnapping. *Robinson v. United States*, App. D.C., 388 A.2d 1210 (1978); *Robinson v. United States*, App. D.C., 501 A.2d 1273 (1985).

Separate conviction for kidnapping can be sustained when the movement of the victim in the commission of another crime places the victim in greater danger or makes it more likely that the perpetrator will succeed in the

underlying crime and will not be apprehended. *Beck v. United States*, App. D.C., 402 A.2d 418 (1979).

Where the indictment charged defendant with kidnapping and assault, the assault charge required that the government prove the defendant's specific intent to rape, and there was nothing to prohibit the government from charging both offenses, with the kidnapping charge surviving when there was an acquittal on the charge of assault with intent to rape. *Davis v. United States*, App. D.C., 613 A.2d 906 (1992).

Prosecutions for both robbery and kidnapping. — Where a person is detained and transported against his will to a different location away from the scene where a truck is hijacked for purposes of robbery, 2 separate and distinct crimes are committed, i.e., kidnapping and armed robbery. *United States v. Wolford*, 444 F.2d 876 (D.C. Cir. 1971).

The forcible detention and carrying away of a robbery victim which began before and continued after the victim was forced to yield his money and other valuables was not a detention approximately coextensive with or a necessary incident to the crime of robbery; hence conviction for the separate offense of kidnapping was within the intent as well as the text of this section. *Sinclair v. United States*, App. D.C., 388 A.2d 1201 (1978), cert. denied, 439 U.S. 1118, 99 S. Ct. 1026, 59 L. Ed. 2d 77 (1979).

While not every robbery gives rise to responsibility for kidnapping, kidnapping does not necessarily merge into robbery when committed during closely related incidents. When the detention or confinement is an integral part of the robbery, the two will merge, and only a robbery conviction will stand. However, where a jury could reasonably conclude that the detention or confinement was not "approximately coextensive" in time and place with the crime itself, then each may constitute a separate criminal act. *Catlett v. United States*, App. D.C., 545 A.2d 1202 (1988), cert. denied, 488 U.S. 1017, 109 S. Ct. 814, 102 L. Ed. 2d 803 (1989).

Actions of defendants in robbery and kidnapping case in forcing the victim into the alley, away from the street where bystanders may have seen and interfered, both exposed the victim to more danger and decreased the risk that appellants would be caught. This forcible detention, which began before and continued after the victim's valuables were forcibly removed, cannot be deemed a detention approximately coextensive or a necessary incident to the crime of robbery. Thus, the evidence was sufficient to convict appellants of both crimes. *Catlett v. United States*, App. D.C., 545 A.2d 1202 (1988), cert. denied, 488 U.S. 1017, 109 S. Ct. 814, 102 L. Ed. 2d 803 (1989).

Appellant's merger claims failed, where the

armed robbery and kidnapping offenses each required proof of an element that the other did not. *Monroe v. United States*, App. D.C., 600 A.2d 98 (1991).

Prosecutions for both robbery and kidnapping. — Kidnapping count did not merge with armed robbery count, despite the fact that one person was the victim of both counts, because the two crimes have different elements. *Hanna v. United States*, 666 A.2d 845 (D.C. App. 1995).

Kidnapping charges merged with the robbery charges because the movements and detentions of the victims were merely incidental to the commission of the robbery. *Vines v. United States*, App. D.C., 540 A.2d 1107 (1988).

Kidnapping convictions did not merge with assault convictions. — Conviction of kidnapping did not merge with convictions of assault with intent to rape while armed, mayhem while armed, and assault with a deadly weapon, since each of the convictions stemming from the assault required proof that appellant was armed, while the kidnapping conviction did not, and since kidnapping required proof of asportation or confinement, while the other offenses required some form of assault. *Whitaker v. United States*, App. D.C., 616 A.2d 843 (1992).

Kidnapping of victim D, kidnapping of victim E, assault of victim H with a dangerous weapon, and assault of victim J with a dangerous weapon all concerned different victims. Accordingly, no merger occurred between any of these counts. *Hanna v. United States*, 666 A.2d 845 (D.C. App. 1995).

First degree burglary while armed count did not merge with kidnapping, armed robbery, or assault with dangerous weapon counts because burglary requires proof of an element (entry into a dwelling with criminal intent) that the other first incident crimes do not. Kidnapping (victim was seized or detained), armed robbery (property of value was taken), and assault with a dangerous weapon (forceful or violent attempt to inflict bodily harm) all require proof of elements that burglary does not. *Hanna v. United States*, 666 A.2d 845 (D.C. App. 1995).

Seizure and asportation merged with assault. — Where defendant without a weapon seized and dragged his victim approximately 63 paces over the course of a few moments before throwing her to the ground and attempting to rape her, that seizure and asportation was clearly incidental to the crime of assault with intent to rape and the likelihood of bodily harm was not substantially increased beyond that inherent in every assault with intent to rape; therefore the seizure and asportation did not constitute the separate crime of kidnapping but rather merged with the assault. *Robinson v. United States*, App. D.C., 388 A.2d 1210 (1978).

Applicability of corroboration rule in kidnapping case. — Although corroboration is generally not required in kidnapping cases, the corroboration rule for sex offenses formerly followed in the District of Columbia federal courts would have applied in a federal court prosecution under this section for kidnapping for the purpose of rape. *United States v. Sheppard*, 569 F.2d 114 (D.C. Cir. 1977).

Cross-examination on prior escape attempts allowed to show kidnapping intent. — Cross-examination of a defendant as to his prior escape attempts in a prosecution for kidnapping and attempted escape is admissible to show that he intended that hostages be taken if the opportunity and need arose. *United States v. Wilkerson*, 548 F.2d 970 (D.C. Cir. 1976).

Unsworn, extrajudicial account given by the complaining witness is not admissible under the doctrine of past recollection recorded. *Tibbs v. United States*, App. D.C., 359 A.2d 13 (1976).

Court may refuse to compel mental examination of minor. — The refusal to compel a mental examination of the complaining witness in a prosecution for kidnapping a minor for purposes of sexual assault is not an abuse of discretion. *Ledbetter v. United States*, App. D.C., 350 A.2d 379 (1976).

Statements made under duress excludable. — In a prosecution for kidnapping a correctional official, there is no error in excluding from evidence statements which allegedly promised immunity from prosecution, as such statements were made under duress. *United States v. Gorham*, 523 F.2d 1088 (D.C. Cir. 1975).

Counsel must request delay to present essential alibi witness. — If the presence of a witness is essential to the credibility of an alibi defense, it is incumbent upon counsel to draw the court's attention to the need for further delay in the proceedings. *Graham v. United States*, App. D.C., 377 A.2d 1138 (1977), cert. denied, 434 U.S. 1022, 98 S. Ct. 748, 54 L. Ed. 2d 770 (1978).

Consent no defense to kidnapping minor for sexual assault. — In a prosecution for kidnapping a minor for purposes of sexual assault, the failure to instruct that consent to sexual advances is a defense was not an error. *Ledbetter v. United States*, App. D.C., 350 A.2d 379 (1976).

Evidence sufficient to sustain conviction. — Although, due to complainant's inability to identify her assailant at trial, the evidence against defendant on the charges was circumstantial, the cumulative weight of this evidence was more than sufficient to sustain the jury's finding that appellant was guilty of the offenses of rape, robbery, and kidnapping

beyond a reasonable doubt. *White v. United States*, App. D.C., 484 A.2d 553 (1984).

Consecutive sentences. — This section allows consecutive sentences for multiple counts of kidnapping involving separate victims. *Razzaaq v. United States*, App. D.C., 514 A.2d 783 (1986).

Evidence held sufficient to support separate convictions under this section and §§ 22-501 and 22-503. — See *Robinson v. United States*, App. D.C., 501 A.2d 1273 (1985).

Jury instructions regarding consent. — Where the trial judge did not instruct the jury that it could find that the complainant consented if it found that the defendant had reasonable grounds to believe that there was consent, the trial judge nevertheless protected defendant's right to a consent instruction by making it clear to the jury that the government had to prove beyond a reasonable doubt that the complainant did not consent to defendant's acts. *Davis v. United States*, App. D.C., 613 A.2d 906 (1992).

Lesser included offense instruction proper. — The trial judge did not err by instructing the jury, over defense objection, on kidnapping as a lesser included offense of kidnapping while armed, because the jury could rationally have had a reasonable doubt about whether appellant was armed at the time he kidnapped the complainant. *Whitaker v. United States*, App. D.C., 616 A.2d 843 (1992).

Cited in *United States v. Regisser*, 309 F. Supp. 879 (D.D.C. 1970); *United States v. Engram*, App. D.C., 337 A.2d 488 (1975), cert. denied, 423 U.S. 1058, 96 S. Ct. 793, 46 L. Ed. 2d 648 (1976); *Wooten v. United States*, App. D.C., 343 A.2d 281 (1975); *Chatman v. United States*, App. D.C., 377 A.2d 1155 (1977); *Smith v. United States*, App. D.C., 389 A.2d 1356, cert. denied, 439 U.S. 1048, 99 S. Ct. 726, 58 L. Ed. 2d 707 (1978); *Brooks v. United States*, App. D.C., 396 A.2d 200 (1978); *Fields v. United States*, App. D.C., 396 A.2d 522 (1978); *Johnson v. United States*, App. D.C., 398 A.2d 354 (1979); *Coombs v. United States*, App. D.C., 399 A.2d 1313 (1979); *Morgan v. United States*, App. D.C., 402 A.2d 598 (1979); *Sampson v. United States*, App. D.C., 406 A.2d 574 (1979); *Bryant v. Civiletti*, 663 F.2d 286 (D.C. Cir. 1981); *United States v. Nunzio*, App. D.C., 430 A.2d 1372 (1981); *Austin v. United States*, App. D.C., 433 A.2d 1081 (1981); *Coligan v. United States*, App. D.C., 434 A.2d 483 (1981); *Warren v. United States*, App. D.C., 436 A.2d 821 (1981); *Sweet v. United States*, App. D.C., 438 A.2d 447 (1981); *United States v. Johnson*, 549 F. Supp. 78 (D.D.C. 1982); *Williamson v. United States*, App. D.C., 445 A.2d 975 (1982); *Sweet v. United States*, App. D.C., 449 A.2d 315 (1982); *United States v. Gant*, 111 WLR 529 (Super. Ct. 1983); *Willis v. United States*, App. D.C., 468 A.2d 1320 (1983); *Boyd v. United States*, App.

D.C., 473 A.2d 828 (1984); *Lucas v. United States*, App. D.C., 497 A.2d 1070 (1985), cert. denied, 475 U.S. 1111, 106 S. Ct. 1523, 89 L. Ed. 2d 920 (1986); *Cox v. United States*, App. D.C., 498 A.2d 231 (1985); *Jenkins v. United States*, App. D.C., 506 A.2d 1120, cert. denied, 479 U.S. 845, 107 S. Ct. 160, 93 L. Ed. 2d 99 (1986); *Black v. United States*, App. D.C., 506 A.2d 1130 (1986); *Kirk v. United States*, App. D.C., 510 A.2d 499 (1986); *Settles v. United States*, App. D.C., 522 A.2d 348 (1987); *Gooding v. United States*, App. D.C., 529 A.2d 301 (1987); *Abrams v. United States*, App. D.C., 531 A.2d 964 (1987); *Easton v. United States*, App. D.C.,

533 A.2d 904 (1987); *Morris v. United States*, App. D.C., 548 A.2d 1383 (1988); *Coates v. United States*, App. D.C., 558 A.2d 1148 (1989); *Caldwell v. United States*, App. D.C., 595 A.2d 961 (1991); *McGrier v. United States*, App. D.C., 597 A.2d 36 (1991); *Street v. United States*, App. D.C., 602 A.2d 141 (1992); *Bond v. United States*, App. D.C., 614 A.2d 892 (1992); *Coleman v. United States*, App. D.C., 619 A.2d 40 (1993); *Skyers v. United States*, App. D.C., 619 A.2d 931 (1993); *Matthews v. United States*, App. D.C., 629 A.2d 1185 (1993); *Hagins v. United States*, App. D.C., 639 A.2d 612 (1994).

CHAPTER 22. LARCENY; RECEIVING STOLEN GOODS.

Sec.

22-2201 to 22-2208. [Repealed].

§§ 22-2201 to 22-2208. Grand larceny; petit larceny; order of restitution; larceny after trust; unauthorized use of vehicles; theft from vehicles; receiving stolen goods; stealing property of District; receiving property stolen from District; destroying stolen property.

Repealed. Dec. 1, 1982, D.C. Law 4-164, § 602(y)-(gg), 29 DCR 3976.

Cross references. — As to inclusion of conduct previously known as larceny in offense of theft, see § 22-3811.

Legislative history of Law 4-164. — Law 4-164, the "District of Columbia Theft and White Collar Crimes Act of 1982," was introduced in Council and assigned Bill No. 4-133, which was referred to the Committee on the

Judiciary. The Bill was adopted on first, amended first and second readings on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.

Editor's notes. — Former § 22-2202 had been amended by D.C. Law 4-202.

CHAPTER 23. LIBEL; BLACKMAIL; EXTORTION; THREATS.

Sec.

22-2301 to 22-2306. [Repealed].

22-2307. Threatening to kidnap or injure a person or damage his property.

§§ 22-2301 to 22-2306. Libel (Penalty; publication; justification); false charges of unchastity; blackmail; intent to commit extortion by communication of illegal threats and demands.

Repealed. Dec. 1, 1982, D.C. Law 4-164, § 602(hh)-(mm), 29 DCR 3976.

Cross references. — As to extortion, see subchapter VI of Chapter 38 of this title.

Legislative history of Law 4-164. — Law 4-164, the "District of Columbia Theft and White Collar Crimes Act of 1982," was introduced in Council and assigned Bill No. 4-133, which was referred to the Committee on the

Judiciary. The Bill was adopted on first, amended first and second readings on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.

§ 22-2307. Threatening to kidnap or injure a person or damage his property.

Whoever threatens within the District of Columbia to kidnap any person or to injure the person of another or physically damage the property of any person or of another person, in whole or in part, shall be fined not more than \$5,000 or imprisoned not more than 20 years, or both. (June 19, 1968, 82 Stat. 238, Pub. L. 90-351, title X, § 1502; 1973 Ed., § 22-2307.)

Cross references. — As to extortion, see § 22-3851.

As to blackmail, see § 22-3852.

Section references. — This section is referred to in § 23-546.

Constitutionality of section. — Where the evidence relied upon to prove a felony under this section is identical to the evidence needed to show a misdemeanor under § 22-507, this section is not rendered void for vagueness or unconstitutional in any other sense. *United States v. Young*, App. D.C., 376 A.2d 809 (1977).

This section was enacted to protect private citizens and businesses of District of Columbia against extortion. *Ball v. United States*, App. D.C., 429 A.2d 1353 (1981).

Separate offenses proscribed in provisions. — Congress did not intend that former § 22-703(a) (see now § 22-722, obstructing justice) and this section be greater and lesser included offenses of each other, or otherwise the same offense within the meaning of double jeopardy analysis. *Ball v. United States*, App. D.C., 429 A.2d 1353 (1981).

The offenses proscribed by former § 22-703 (see now § 22-722 obstructing justice) and this

section lack the inherent relationship required to apply the doctrines of merger and lesser included offenses. *Ball v. United States*, App. D.C., 429 A.2d 1353 (1981).

"Threats" defined. — A person "threatens" when she utters words which are intended to convey her desire to inflict physical or other harm on any person or on property, and these words are communicated to someone. *United States v. Baish*, App. D.C., 460 A.2d 38 (1983).

Words threatening victim's life not constitutionally protected. — In the context of a business transaction aimed at hiring someone to kill a third party, words threatening intended victim's life are not constitutionally protected. *Beard v. United States*, App. D.C., 535 A.2d 1373 (1988).

Intent. — Intent to extort is not an element of this section. *Holt v. United States*, App. D.C., 565 A.2d 970 (1989).

No crime committed until threat heard by someone other than speaker. — A person making threats does not commit a crime until the threat is heard by one other than the speaker. *United States v. Baish*, App. D.C., 460 A.2d 38 (1983).

To be subject to criminal prosecution, an individual must do more than utter a threat; the evidence must show that the threatening message was conveyed to someone — either to the object of the threat or to a third party. *United States v. Baish*, App. D.C., 460 A.2d 38 (1983).

Crime was complete as soon as threat was communicated to a third party, regardless of whether the intended victim ever knew of the plot. *Beard v. United States*, App. D.C., 535 A.2d 1373 (1988).

Threat heard and understood by third party. — Even though the man threatened could not understand English, a third party heard and understood the threat; therefore, the government presented sufficient evidence for jury to decide whether a threat was communicated. *Joiner v. United States*, App. D.C., 585 A.2d 176 (1991).

Uncommunicated threat, by definition, cannot threaten. *United States v. Baish*, App. D.C., 460 A.2d 38 (1983).

Conduct constituting both felony and misdemeanor allows election of prosecution. — If the facts show that the same conduct constitutes both a felony under this section and a misdemeanor under § 22-507, an election may be made to prosecute under either section. *United States v. Young*, App. D.C., 376 A.2d 809 (1977).

Indictment does not have to contain the actual words of the alleged threat or allege that the threats were made knowingly and intentionally. *United States v. Young*, App. D.C., 376 A.2d 809 (1977).

Admission of voice spectrographic identification, if error, was harmless in trial charging defendant with making threatening telephone calls where his motive and opportunity were shown by circumstantial evidence corroborating his admissions of the crime to a co-worker and the aural identification of his voice by 2 persons who had had ample opportunity to hear the telephoned threats. *Brown v. United States*, App. D.C., 384 A.2d 647 (1978).

Acquittal on “bodily harm” charge no bar to “obstruction of justice” retrial. — An acquittal of a threat to do bodily harm and a “hung” determination on a charge of obstruction of justice, does not collaterally estop the government from retrying the accused on the obstruction of justice charge, even where identical threats are involved. *United States v. Smith*, App. D.C., 337 A.2d 499 (1975).

Offenses not merged. — Where it was clear that the defendant distinctly singled out and focused on each of the two victims while uttering words and physically touching them, one after the other, the defendant committed two separate offenses under the felony threats statute. *Joiner v. United States*, App. D.C., 585 A.2d 176 (1991).

Proof that threat made within jurisdiction. — Where the person threatened could not understand English, the government must only prove the threat was made within the jurisdiction, not that the threat was interpreted for the victim within the jurisdiction. *Joiner v. United States*, App. D.C., 585 A.2d 176 (1991).

Evidence was sufficient to sustain conviction. *Holt v. United States*, App. D.C., 565 A.2d 970 (1989).

Illegal sentence. — Where defendant was indicted and convicted under this section, and sentenced to six months’ imprisonment on the theory that the conduct only amounted to a misdemeanor, the sentence was illegal. *Hayward v. United States*, App. D.C., 612 A.2d 224 (1992).

Cited in *Mariam v. United States*, App. D.C., 385 A.2d 776 (1978); *Thomas v. United States*, App. D.C., 418 A.2d 122 (1980); *United States v. Powell*, 112 WLR 564 (Super. Ct.); *McGrier v. United States*, App. D.C., 597 A.2d 36 (1991); *McClain v. United States*, App. D.C., 601 A.2d 80 (1992); *United States v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993); *Maldonado v. Maldonado*, App. D.C., 631 A.2d 40 (1993); *Hood v. United States*, App. D.C., 661 A.2d 1081 (1995); *Lee v. United States*, App. D.C., 668 A.2d 822 (1995).

CHAPTER 24. MURDER; MANSLAUGHTER.

Sec.

22-2401. Murder in the first degree — Purposeful killing; killing while perpetrating certain crimes.

22-2402. Same — Placing obstructions upon or displacement of railroads.

22-2403. Murder in the second degree.

Sec.

22-2404. Penalty for murder in first and second degrees.

22-2404.1. Sentencing procedure for murder in the first degree.

22-2405. Penalty for manslaughter.

22-2406. Murder of law enforcement officer.

§ 22-2401. Murder in the first degree — Purposeful killing; killing while perpetrating certain crimes.

Whoever, being of sound memory and discretion, kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in § 22-401 or § 22-402, first degree sexual abuse, mayhem, robbery, or kidnapping, or in perpetrating or attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, or in perpetrating or attempting to perpetrate a felony involving a controlled substance, is guilty of murder in the first degree. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 798; June 12, 1940, 54 Stat. 347, ch. 339; 1973 Ed., § 22-2401; Sept. 26, 1992, D.C. Law 9-153, § 2(a), 39 DCR 3868; May 23, 1995, D.C. Law 10-257, § 401(b)(1), 42 DCR 53.)

I. General Consideration.

II. Elements.

A. In General.

B. Intent.

C. Premeditation.

D. Malice.

E. Motive.

III. Felony Murder.

IV. Procedure.

A. In General.

B. Indictment.

C. Defenses.

D. Evidence.

E. Instructions.

F. Verdict.

G. Sentence.

H. Appeal.

I. GENERAL CONSIDERATION.

Cross references. — As to punishment for first and second degree murder, see § 22-2404.

Section references. — This section is referred to in §§ 6-2427, 11-502, 22-2403, 23-546 and 24-482.

Effect of amendments. — D.C. Law 10-257 substituted “first degree sexual abuse” for “rape.”

Legislative history of Law 9-153. — See note to § 22-2404.1.

Legislative history of Law 10-257. — Law 10-257, the “Anti-Sexual Abuse Act of 1994,” was introduced in Council and assigned Bill No. 10-87, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on November 1, 1994, and December 6, 1994, respectively. Signed by the Mayor on December 28, 1994, it was assigned

Act No. 10-385 and transmitted to both Houses of Congress for its review. D.C. Law 10-257 became effective May 23, 1995.

Assertion that section is unconstitutionally vague was without merit since the defendant could not realistically claim to have been unaware that his conduct could result in conviction for first degree murder. *Waller v. United States*, App. D.C., 389 A.2d 801 (1978), cert. denied, 446 U.S. 901, 100 S. Ct. 1824, 64 L. Ed. 2d 253 (1980).

Definition of murder in this section is the common law definition of the crime. *Hamilton v. United States*, 26 App. D.C. 382 (1905); *Bishop v. United States*, 107 F.2d 297 (D.C. Cir. 1939).

Common law codified. — This section merely codifies the common law definition of first degree murder rather than fashioning a new crime. *O'Connor v. United States*, App. D.C., 399 A.2d 21 (1979).

"Murder in first degree" defined. — Murder in the first degree is a purposeful killing done either with premeditated malice or while committing or attempting to commit a felony. *Goodall v. United States*, 180 F.2d 397 (D.C. Cir.), cert. denied, 339 U.S. 987, 70 S. Ct. 1009, 94 L. Ed. 1389 (1950).

Distinction between first degree and second degree murder. — The distinguishing characteristic of first degree murder is that it is a deliberate, premeditated, intentional killing, while the killing in a second degree murder may be intentional or unintentional. *Hansborough v. United States*, 308 F.2d 645 (D.C. Cir. 1962).

An intentional killing may be second degree murder if premeditation and deliberation do not exist. *Tucker v. United States*, 318 F.2d 221 (D.C. Cir. 1963), cert. denied, 381 U.S. 952, 85 S. Ct. 1812, 14 L. Ed. 2d 726 (1965).

An intentional murder is murder in the first degree if it is committed in cold blood and it is murder in the second degree if it is committed on impulse or in the sudden heat of passion. *Austin v. United States*, 382 F.2d 129 (D.C. Cir. 1967), overruled on other grounds, *United States v. Foster*, 783 F.2d 1082 (D.C. Cir. 1986).

A first degree murder requires premeditation and deliberation and may be a calculated and planned killing, while homicides that are unplanned or impulsive, even though they are intentional and with malice aforethought, are murders in the second degree. *Austin v. United States*, 382 F.2d 129 (D.C. Cir. 1967), overruled on other grounds, *United States v. Foster*, 783 F.2d 1082 (D.C. Cir. 1986).

A murder in the first degree is an intentional homicide done deliberately and with premeditation, and a homicide that is intentional but "impulsive" and is not done after "reflection and meditation" is murder in the second degree. *United States v. Brawner*, 471 F.2d 969 (D.C.

Cir. 1972), superseded on other grounds, *Shannon v. United States*, — U.S. —, 114 S.Ct. 2419, 129 L.Ed 2d 459 (1994).

The distinguishing feature between first and second degree murder is that first degree murder includes the elements of premeditation and deliberation while second degree murder does not. *Butler v. United States*, App. D.C., 322 A.2d 279 (1974).

Premeditation and deliberation distinguish first and second degree murder. First degree murder, with its requirement of premeditation and deliberation, covers calculated and planned killings while homicides that are unplanned or impulsive, even though they are intentional and with malice aforethought, are murder in the second degree. *Hall v. United States*, App. D.C., 454 A.2d 314 (1982).

First degree murder is a calculated and planned killing while second degree murder is unplanned or impulsive. *Watson v. United States*, App. D.C., 501 A.2d 791 (1985).

Second degree murder is an included offense under an indictment for felony murder. *Jackson v. United States*, 313 F.2d 572 (D.C. Cir. 1962); *Price v. United States*, App. D.C., 531 A.2d 984 (1987).

And defendant may be convicted of lesser offense. — Under an indictment charging first degree murder done during the perpetration or attempted perpetration of another felony, the defendant may, if the evidence warrants, be found guilty of the necessarily included offense of second degree murder. *Green v. United States*, 218 F.2d 856 (D.C. Cir. 1955).

But only if proof of felony murder defective. — A jury may consider the issue of second degree murder on an indictment of first degree felony murder only if it finds some defect with the proof as to felony murder. *Fuller v. United States*, 407 F.2d 1199 (D.C. Cir. 1967), cert. denied, 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125 (1969).

Where an indictment charges felony murder, a verdict of second degree murder is appropriate if there is proof that the defendant did not commit the felony but is guilty of an intentional killing on impulse. *Fuller v. United States*, 407 F.2d 1199 (D.C. Cir. 1967), cert. denied, 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125 (1969).

And conviction upheld where evidence sufficient and instructions proper. — Where the evidence is sufficient on a charge of first degree murder and the jury is properly instructed, a refusal to direct a verdict on first degree murder cannot influence the jury to reach a verdict of second degree murder. *Thomas v. United States*, 158 F.2d 97 (D.C. Cir. 1946), cert. denied, 331 U.S. 822, 67 S. Ct. 1303, 91 L. Ed. 1838 (1947).

Merger of convictions for first degree murder and felony murder of the same victim. —

Where defendant was convicted of 1 count of first degree premeditated murder and 3 counts of first degree felony murder, and the felony murder convictions were based on the underlying felonies of armed burglary and armed robbery, of which he was also convicted, defendant could not remain convicted of both first degree premeditated murder and first degree felony murder of the same victim. *Thacker v. United States*, App. D.C., 599 A.2d 52 (1991).

Attempted armed robbery is lesser included offense of felony murder. *Price v. United States*, App. D.C., 531 A.2d 984 (1987).

Distinction between murder and manslaughter. — To reduce a homicide from murder to manslaughter, the defendant must not only show that he acted under the influence of passion but, in addition, that there was a sufficient cause of provocation for his passion. *Jackson v. United States*, 48 App. D.C. 272 (1919).

An unlawful killing in the sudden heat of passion, whether produced by rage, resentment, anger, terror or fear, is reduced from murder to manslaughter only if there was adequate provocation, such as might naturally induce a reasonable man in the heat of passion to lose some self-control and commit the act on impulse and without reflection. *Austin v. United States*, 382 F.2d 129 (D.C. Cir. 1967), overruled on other grounds, *United States v. Foster*, 783 F.2d 1082 (D.C. Cir. 1986).

Legal provocation can reduce the offense of murder to manslaughter. *Hurt v. United States*, App. D.C., 337 A.2d 215 (1975).

What is reasonably adequate provocation for manslaughter is generally a question for the jury. *Jackson v. United States*, 48 App. D.C. 272 (1919).

Joinder appropriate. — Crimes were appropriately joined in the same indictment. *United States v. Peoples*, 116 WLR 1161 (Super. Ct. 1988).

No concurrent sentences for felony murder and premeditated murder for single killing. — For a single killing, one may not be convicted of, and receive concurrent sentences for, both first degree felony murder while armed and first degree premeditated murder while armed. *Byrd v. United States*, App. D.C., 510 A.2d 1035 (1986).

Cited in *Burge v. United States*, 26 App. D.C. 524 (1906); *Johnson v. United States*, 38 App. D.C. 347, aff'd, 225 U.S. 405, 32 S. Ct. 748, 56 L. Ed. 1142 (1912); *Smith v. United States*, 269 F. 860 (D.C. Cir. 1921); *Murray v. United States*, 288 F. 1008 (D.C. Cir.), cert. denied, 262 U.S. 757, 43 S. Ct. 703, 67 L. Ed. 1218 (1923); *Bell v. United States*, 47 F.2d 438 (D.C. Cir. 1931); *Robinson v. United States*, 63 F.2d 147 (D.C. Cir.), cert. denied, 289 U.S. 749, 53 S. Ct.

697, 77 L. Ed. 1494 (1933); *Medley v. United States*, 155 F.2d 857 (D.C. Cir.), cert. denied, 328 U.S. 873, 66 S. Ct. 1377, 90 L. Ed. 1642 (1946); *Pritchett v. United States*, 185 F.2d 438 (D.C. Cir. 1950), cert. denied, 341 U.S. 905, 71 S. Ct. 608, 95 L. Ed. 1344 (1951); *Tyler v. United States*, 193 F.2d 24 (D.C. Cir. 1951), cert. denied, 343 U.S. 908, 72 S. Ct. 639, 96 L. Ed. 1326 (1952); *Stewart v. United States*, 366 U.S. 1, 81 S. Ct. 941, 6 L. Ed. 2d 84 (1961); *United States v. Naples*, 205 F. Supp. 944 (D.D.C. 1962); *Smith v. United States*, 324 F.2d 879 (D.C. Cir. 1963), cert. denied, 377 U.S. 954, 84 S. Ct. 1632, 12 L. Ed. 2d 498 (1964); *Jackson v. United States*, 395 F.2d 615 (D.C. Cir. 1968); *Bowles v. United States*, 439 F.2d 536 (D.C. Cir. 1970), cert. denied, 401 U.S. 995, 91 S. Ct. 1240, 28 L. Ed. 2d 533 (1971); *United States v. Brooks*, 449 F.2d 1077 (D.C. Cir. 1971); *United States v. Parman*, 461 F.2d 1203 (D.C. Cir. 1971); *United States v. Butler*, 325 F. Supp. 886 (D.D.C. 1971), aff'd, 481 F.2d 531 (D.C. Cir. 1973); *In re D.S.A.*, App. D.C., 283 A.2d 829 (1971); *United States v. Robinson*, 459 F.2d 1164 (D.C. Cir. 1972); *United States v. Howard*, 470 F.2d 406 (D.C. Cir. 1972); *United States v. Marshall*, 471 F.2d 1051 (D.C. Cir. 1972); *United States v. Hurt*, 476 F.2d 1164 (D.C. Cir. 1973); *United States v. Person*, 478 F.2d 659 (D.C. Cir. 1973); *United States v. Smith*, 490 F.2d 789 (D.C. Cir. 1974); *United States v. Mackin*, 502 F.2d 429 (D.C. Cir.), cert. denied, 419 U.S. 1052, 95 S. Ct. 629, 42 L. Ed. 2d 647 (1974); *United States v. Wiggins*, 509 F.2d 454 (D.C. Cir. 1975); *United States v. DeLoach*, 530 F.2d 990 (D.C. Cir. 1975), cert. denied, 426 U.S. 909, 96 S. Ct. 2232, 48 L. Ed. 2d 834 (1976); *Thornton v. United States*, App. D.C., 357 A.2d 429, cert. denied, 429 U.S. 1024, 97 S. Ct. 644, 50 L. Ed. 2d 626 (1976); *Cooper v. United States*, App. D.C., 363 A.2d 982 (1976); *Long v. United States*, App. D.C., 364 A.2d 1174 (1976); *United States v. Morgan*, 567 F.2d 479 (D.C. Cir. 1977); *Taylor v. United States*, App. D.C., 372 A.2d 1009 (1977); *Johnson v. United States*, App. D.C., 373 A.2d 596 (1977); *Harris v. United States*, App. D.C., 375 A.2d 505 (1977); *Frezzell v. United States*, App. D.C., 380 A.2d 1382 (1977), cert. denied, 439 U.S. 931, 99 S. Ct. 319, 58 L. Ed. 2d 324 (1978); *Harling v. United States*, App. D.C., 382 A.2d 845 (1978); *Givens v. United States*, App. D.C., 385 A.2d 24 (1978); *Harling v. United States*, App. D.C., 387 A.2d 1101 (1978); *Strickland v. United States*, App. D.C., 389 A.2d 1325 (1978), cert. denied, 440 U.S. 926, 99 S. Ct. 1258, 59 L. Ed. 2d 481 (1979); *Reavis v. United States*, App. D.C., 395 A.2d 75 (1978); *In re W.B.W.*, App. D.C., 397 A.2d 143 (1979); *Washington v. United States*, App. D.C., 397 A.2d 946 (1979); *Sousa v. United States*, App. D.C., 400 A.2d 1036, cert. denied, 444 U.S. 981, 100 S. Ct. 484, 62 L. Ed. 2d 408 (1979); *Smothers v. United States*, App. D.C.,

403 A.2d 306 (1979); *Hill v. United States*, App. D.C., 404 A.2d 525 (1979), cert. denied, 444 U.S. 1085, 100 S. Ct. 1042, 62 L. Ed. 2d 770 (1980); *Jackson v. United States*, App. D.C., 404 A.2d 911 (1979); *Parker v. United States*, App. D.C., 406 A.2d 1275 (1979); *Khaalil v. United States*, App. D.C., 408 A.2d 313 (1979), cert. denied, 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781 (1980); *Calaway v. United States*, App. D.C., 408 A.2d 1220 (1979); *Tabron v. United States*, App. D.C., 410 A.2d 209 (1979); *Hallman v. United States*, App. D.C., 410 A.2d 215 (1979); *Rindgo v. United States*, App. D.C., 411 A.2d 373 (1980); *Clark v. United States*, App. D.C., 412 A.2d 21 (1980); *In re T.L.J.*, App. D.C., 413 A.2d 154 (1980); *Morton v. United States*, App. D.C., 415 A.2d 800 (1980); *Tillery v. United States*, App. D.C., 419 A.2d 970 (1980); *United States v. McKoy*, 645 F.2d 1037 (D.C. Cir. 1981); *United States v. Watts*, 532 F. Supp. 354 (D.D.C. 1981); *Towles v. United States*, App. D.C., 428 A.2d 836 (1981); *Lewis v. United States*, App. D.C., 430 A.2d 528, cert. denied, 454 U.S. 1081, 102 S. Ct. 635, 70 L. Ed. 2d 615 (1981); *McEachin v. United States*, App. D.C., 432 A.2d 1212 (1981); *Johnson v. United States*, App. D.C., 434 A.2d 415 (1981); *Lucas v. United States*, App. D.C., 436 A.2d 1282 (1981); *In re Hurt*, App. D.C., 437 A.2d 590 (1981); *United States v. Frady*, 456 U.S. 152, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); *United States v. Jackson*, App. D.C., 450 A.2d 419 (1982); *Parks v. United States*, App. D.C., 451 A.2d 591 (1982), cert. denied, 461 U.S. 945, 103 S. Ct. 2123, 77 L. Ed. 2d 1303 (1983); *McClinnahan v. United States*, App. D.C., 454 A.2d 1340 (1982), cert. denied, 464 U.S. 867, 104 S. Ct. 205, 78 L. Ed. 2d 179 (1983); *United States v. Minick*, App. D.C., 455 A.2d 874, cert. denied, 464 U.S. 831, 104 S. Ct. 111, 78 L. Ed. 2d 112 (1983); *McCowan v. United States*, App. D.C., 458 A.2d 1191 (1983); *Jefferson v. United States*, App. D.C., 463 A.2d 681 (1983); *Brown v. United States*, App. D.C., 464 A.2d 120 (1983); *Welch v. United States*, App. D.C., 466 A.2d 829 (1983); *Merriweather v. United States*, App. D.C., 466 A.2d 853 (1983); *Reese v. United States*, App. D.C., 467 A.2d 152 (1983); *In re C.L.W.*, App. D.C., 467 A.2d 706 (1983); *Graves v. United States*, App. D.C., 467 A.2d 712 (1983); *Morris v. United States*, App. D.C., 469 A.2d 432 (1983); *Wells v. United States*, App. D.C., 469 A.2d 1248 (1983); *Sherer v. United States*, App. D.C., 470 A.2d 732 (1983), cert. denied, 469 U.S. 931, 105 S. Ct. 325, 83 L. Ed. 2d 262 (1984); *Graves v. United States*, App. D.C., 472 A.2d 395, cert. denied, 469 U.S. 846, 105 S. Ct. 158, 83 L. Ed. 2d 95 (1984); *Sherrod v. United States*, App. D.C., 478 A.2d 644 (1984); *Jaggers v. United States*, App. D.C., 482 A.2d 786 (1984); *Jones v. United States*, App. D.C., 483 A.2d 1149 (1984), cert. denied, 471 U.S. 1118, 105 S. Ct. 2363, 86 L. Ed. 2d 263 (1985);

Hawthorne v. United States, App. D.C., 504 A.2d 580, cert. denied, 479 U.S. 992, 107 S. Ct. 593, 93 L. Ed. 2d 594 (1986); *Doepel v. United States*, App. D.C., 510 A.2d 1044 (1986); *United States v. Brooks*, 114 WLR 437 (Super. Ct. 1986); *Lucas v. United States*, App. D.C., 522 A.2d 876 (1987); *United States v. Jackson*, App. D.C., 528 A.2d 1211 (1987); *Waller v. United States*, App. D.C., 531 A.2d 994 (1987); *Gibson v. United States*, App. D.C., 536 A.2d 78 (1987); *Brooks v. United States*, App. D.C., 536 A.2d 1091 (1988); *Ellerbe v. United States*, App. D.C., 545 A.2d 1197, cert. denied, 488 U.S. 868, 109 S. Ct. 174, 102 L. Ed. 2d 144 (1988); *Townsend v. United States*, App. D.C., 549 A.2d 724 (1988), cert. denied, 490 U.S. 1102, 109 S. Ct. 2457, 104 L. Ed. 2d 1011 (1989); *Thomas v. United States*, App. D.C., 557 A.2d 599 (1989); *Seeney v. United States*, App. D.C., 563 A.2d 1081 (1989), cert. denied, 498 U.S. 858, 111 S. Ct. 158, 112 L. Ed. 2d 124 (1990); *Martin v. United States*, App. D.C., 567 A.2d 896 (1989); *United States v. McNeil*, 911 F.2d 768 (D.C. Cir. 1990); *James v. United States*, App. D.C., 580 A.2d 636 (1990); *Bass v. United States*, App. D.C., 580 A.2d 669 (1990); *Green v. United States*, App. D.C., 580 A.2d 1325 (1990); *Ali v. United States*, App. D.C., 581 A.2d 368 (1990), cert. denied, 502 U.S. 893, 112 S. Ct. 259, 116 L. Ed. 2d 213 (1991); *Belton v. United States*, App. D.C., 581 A.2d 1205 (1990); *Comber v. United States*, App. D.C., 584 A.2d 26 (1990); *United States v. Edmond*, 924 F.2d 261 (D.C. Cir.), cert. denied, 502 U.S. 838, 112 S. Ct. 125, 116 L. Ed. 2d 92 (1991); *Russell v. United States*, App. D.C., 586 A.2d 695 (1991); *Wilson v. United States*, App. D.C., 590 A.2d 1002, cert. denied, 501 U.S. 1257, 111 S. Ct. 2906, 115 L. Ed. 2d 1069 (1991); *Felder v. United States*, App. D.C., 595 A.2d 974 (1991); *In re D.A.*, App. D.C., 597 A.2d 1331 (1991); *Hill v. United States*, App. D.C., 600 A.2d 58 (1991); *McClain v. United States*, App. D.C., 601 A.2d 80 (1992); *Price v. United States*, App. D.C., 602 A.2d 641 (1992); *Martin v. United States*, App. D.C., 606 A.2d 120 (1991); *Mitchell v. United States*, App. D.C., 609 A.2d 1099 (1992); *Martin v. United States*, App. D.C., 614 A.2d 51 (1992); *Halicki v. United States*, App. D.C., 614 A.2d 499 (1992); *Foster v. United States*, App. D.C., 615 A.2d 213 (1992); *Jenkins v. United States*, App. D.C., 617 A.2d 529 (1992); *Speaks v. United States*, App. D.C., 617 A.2d 942 (1992); *Byrd v. United States*, App. D.C., 618 A.2d 596 (1992); *Brown v. United States*, App. D.C., 619 A.2d 1180 (1992); *Dickerson v. United States*, App. D.C., 620 A.2d 270 (1993); *Ray v. United States*, App. D.C., 620 A.2d 860 (1993); *Morris v. United States*, App. D.C., 622 A.2d 1116, cert. denied, — U.S. —, 114 S. Ct. 270, 126 L. Ed. 2d 221 (1993); *Marshall v. United States*, App. D.C., 623 A.2d 551 (1992); *Jackson v. United States*, App. D.C., 623 A.2d 571, cert. denied, — U.S. —, 114 S. Ct. 649, 126

L. Ed. 2d 607 (1993); *Everetts v. United States*, App. D.C., 627 A.2d 981 (1993), cert. denied, — U.S. —, 115 S. Ct. 144, 130 L. Ed. 2d 84 (1994); *United States v. Harris*, App. D.C., 629 A.2d 481 (1993); *Cowan v. United States*, App. D.C., 629 A.2d 496 (1993); *McIntyre v. United States*, App. D.C., 634 A.2d 940 (1993); *Kinard v. United States*, App. D.C., 635 A.2d 1297 (1993); *Young v. United States*, App. D.C., 639 A.2d 92 (1994); *Martin v. United States*, App. D.C., 647 A.2d 1135 (1994); *Byers v. United States*, App. D.C., 649 A.2d 279 (1994); *Mayfield v. United States*, App. D.C., 659 A.2d 1249 (1995); *In re M.A.M.*, 124 WLR 173 (Super. Ct. 1995).

II. ELEMENTS.

A. In General.

Prosecution may use any provision of section. — Under an indictment charging common law murder in the first degree, the prosecution may prove facts to bring the case within any of the provisions of this section. *Burton v. United States*, 151 F.2d 17 (D.C. Cir.), cert. denied, 326 U.S. 789, 66 S. Ct. 473, 90 L. Ed. 479 (1945).

Causation. — Where defendant slashed the throat of his girlfriend from ear to ear, and where she survived the initial assault but died suddenly six weeks later from hepatitis apparently contracted as a result of the treatment of her wounds, the hepatitis was not an unforeseeable consequence of appellant's actions and thus did not constitute an intervening cause that would relieve him of criminal responsibility. *McKinnon v. United States*, App. D.C., 550 A.2d 915 (1988).

Aiding and abetting a murder. — In showing that defendant aided and abetted in murder and in assault, the government had to prove that he knowingly participated in the shootings by assisting the principal or participating in the commission of the crimes with guilty knowledge. *Leonard v. United States*, App. D.C., 602 A.2d 1112 (1992).

The intent requirement for murder, in the case against an aider and abettor, is satisfied by the aider and abettor's intent to commit the underlying felony. *Prophet v. United States*, App. D.C., 602 A.2d 1087 (1992).

There was clear and convincing evidence defendant acted knowingly as an accomplice to murder. *Leonard v. United States*, App. D.C., 602 A.2d 1112 (1992).

B. Intent.

Deliberate intent to take life is an essential element of first degree murder. *Sabens v. United States*, 40 App. D.C. 440 (1913); *Jordon v. United States*, 87 F.2d 64 (D.C. Cir. 1936), cert. denied, 303 U.S. 654, 58 S. Ct. 762, 82 L. Ed. 1114 (1938).

Offense of deliberated and premeditated murder requires a specific intent that cannot be satisfied merely by showing a failure to conform to an objective standard. *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972), superseded on other grounds, *Shannon v. United States*, — U.S. — 114 S.Ct. 2419, 129 L.Ed 2d 459 (1994).

Transferred intent. — First degree murder under this section can be proved on a theory of transferred intent. *O'Connor v. United States*, App. D.C., 399 A.2d 21 (1979).

When a defendant purposely attempts to kill one person but by mistake or accident kills another, the felonious intent of the defendant will be transferred from the intended victim to the actual, unintended victim. *O'Connor v. United States*, App. D.C., 399 A.2d 21 (1979).

The doctrine of transferred intent, whereby one who intends to kill 1 person and kills a bystander instead is deemed to have committed whatever form of homicide would have been committed had he killed the intended victim, is applicable to this section. *United States v. Sampol*, 636 F.2d 621 (D.C. Cir. 1980), overruled on other grounds, 717 F.2d 1444 (D.C. Cir. 1983).

Prosecution is required to show a purpose to kill in a murder prosecution. *Jordon v. United States*, 87 F.2d 64 (D.C. Cir. 1936), cert. denied, 303 U.S. 654, 58 S. Ct. 762, 82 L. Ed. 2d 1114 (1938).

Except for felony murder. — In a killing of another while armed with or using a dangerous weapon in the perpetration or attempted perpetration of a robbery, it is not necessary to show that the killing was done purposely to raise the offense to first degree murder. *Mumforde v. United States*, 130 F.2d 411 (D.C. Cir.), cert. denied, 317 U.S. 656, 63 S. Ct. 53, 87 L. Ed. 527 (1942).

"Purposely" defined. — The word "purposely" is synonymous with "intentionally"; it does not refer to the purpose of, or the intention in, the killing. *Collazo v. United States*, 196 F.2d 573 (D.C. Cir.), cert. denied, 343 U.S. 968, 72 S. Ct. 1065, 96 L. Ed. 1364 (1952).

Defendant should be allowed to testify as to his own intent. *Collazo v. United States*, 196 F.2d 573 (D.C. Cir.), cert. denied, 343 U.S. 968, 72 S. Ct. 1065, 96 L. Ed. 1364 (1952).

Proof of the purpose in a murder prosecution need not be direct; it may be inferred from the circumstances attending the killing. *Jordon v. United States*, 87 F.2d 64 (D.C. Cir. 1936), cert. denied, 303 U.S. 654, 58 S. Ct. 762, 82 L. Ed. 1114 (1938).

Circumstantial evidence. — Intent being a state of mind, unless admitted by the defendant, it must be shown by circumstantial evi-

dence because there is no way of fathoming and scrutinizing the human mind. *Jones v. United States*, App. D.C., 516 A.2d 929 (1986), cert. denied, 481 U.S. 1054, 107 S. Ct. 2193, 95 L. Ed. 2d 848 (1987).

Proof of similar acts negates innocent intent. — In a prosecution for homicide, the proof of a recurrence of other similar acts tends to negate any form of innocent intent. *Copeland v. United States*, 152 F.2d 769 (D.C. Cir. 1945), cert. denied, 328 U.S. 841, 66 S. Ct. 1010, 90 L. Ed. 1615 (1946).

Question of defendant's mental responsibility for killing another is for jury to decide. *United States v. Marshall*, 471 F.2d 1051 (D.C. Cir. 1972).

The jury may consider whether a defendant's mental condition negated his ability to form the requisite mental state for first degree murder. *United States v. Peterson*, 509 F.2d 408 (D.C. Cir. 1974).

Evidence on mental condition required to be scientific and direct. — Evidence on the issue of whether a defendant's mental condition negated his ability to form the requisite mental state for first degree murder, must be sufficiently grounded in scientific fact and directly addressed to the mental element at issue. *United States v. Peterson*, 509 F.2d 408 (D.C. Cir. 1974).

Evidence of diminished intellect rejected. — Evidence of diminished intellect does not permit a verdict of a lesser degree of homicide than first degree murder. *Stewart v. United States*, 275 F.2d 617 (D.C. Cir. 1960), rev'd on other grounds, 366 U.S. 1, 81 S. Ct. 941, 6 L. Ed. 2d 84 (1961).

As is evidence of emotional strain. — Where the defendant does not claim insanity or offer expert psychiatric evidence but merely testifies that he was under an emotional strain at the time of the killing, his stressful state of mind cannot be considered in determining whether he was capable of forming a specific intent, whether there was malice, deliberation and premeditation or whether there was provocation. *Morgan v. United States*, App. D.C., 363 A.2d 999 (1976), cert. denied, 431 U.S. 919, 97 S. Ct. 2187, 53 L. Ed. 2d 231 (1977).

C. Premeditation.

Elements of first degree premeditated murder while armed. — To establish first degree premeditated murder while armed, the government must prove, among other things, that the accused committed the crime intentionally with premeditation and deliberation while armed. *Head v. United States*, App. D.C., 451 A.2d 615 (1982).

Premeditation and deliberation are necessary elements of first degree murder. *Mergner v. United States*, 147 F.2d 572 (D.C.

Cir.), cert. denied, 325 U.S. 850, 65 S. Ct. 1085, 89 L. Ed. 1971 (1945).

Which the government must prove. — To prove a first degree murder, the government must prove beyond a reasonable doubt that the crime was committed not merely intentionally, in sustained frenzy or heat of passion, but with premeditation and deliberation. *United States v. Peterson*, 509 F.2d 408 (D.C. Cir. 1974).

Under this section, the prosecution bears the burden of proving not only that a crime was committed intentionally but that it was done with premeditation and deliberation. *Freundak v. United States*, App. D.C., 408 A.2d 364 (1979).

Except for felony murder. — The perpetration of a robbery during which an act of homicide is committed legally takes the place of the element of premeditation to kill, which is necessary for murder in the first degree. *Burton v. United States*, 151 F.2d 17 (D.C. Cir.), cert. denied, 326 U.S. 789, 66 S. Ct. 473, 90 L. Ed. 479 (1945).

Premeditation may be defined as "the formation of the intent to kill." *United States v. Peterson*, 509 F.2d 408 (D.C. Cir. 1974).

Method of proving deliberation. — Deliberation is proved by demonstrating that the accused acted with consideration and reflection upon the preconceived design to kill; turning it over in the mind, giving it a second thought. *Freundak v. United States*, App. D.C., 408 A.2d 364 (1979); *Hall v. United States*, App. D.C., 454 A.2d 314 (1982).

Proof of deliberation requires evidence that the defendant acted with consideration and reflection upon the preconceived design to kill. *Head v. United States*, App. D.C., 451 A.2d 615 (1982).

While multiple stab wounds do not alone support an inference of premeditation and deliberation, they can properly be joined with other factors to support such an inference. *Patton v. United States*, App. D.C., 633 A.2d 800 (1993).

And premeditation. — To prove premeditation, the government must show that a defendant gave thought, before acting, to the idea of taking a human life and reached a definite decision to kill. *Freundak v. United States*, App. D.C., 408 A.2d 364 (1979); *Head v. United States*, App. D.C., 451 A.2d 615 (1982).

Inference. — Both premeditation and deliberation may be inferred from the surrounding facts and circumstances, and may occur in a period as brief as a few seconds. *Harris v. United States*, App. D.C., 668 A.2d 839 (1995).

Motive supports inference of premeditation. — A motive to seek revenge, particularly if it arises well before the commission of the crime, reinforces an inference of premeditation.

Ruffin v. United States, App. D.C., 642 A.2d 1288 (1994).

Appreciable time must elapse before reflection and consideration amount to deliberation and premeditation. Bullock v. United States, 122 F.2d 213 (D.C. Cir. 1941), cert. denied, 317 U.S. 627, 63 S. Ct. 39, 87 L. Ed. 507 (1942).

Some appreciable time must elapse during which the necessary premeditation can take place in order to have a conviction for premeditated murder. United States v. Mack, 466 F.2d 333 (D.C. Cir.), cert. denied, 409 U.S. 952, 93 S. Ct. 297, 34 L. Ed. 2d 223 (1972).

A homicide conceived in passion constitutes murder in the first degree only if there is an appreciable time after a design is conceived and, in this interval, there is further thought and a turning over in the mind and not a mere persistence of an initial impulse of passion. Austin v. United States, 382 F.2d 129 (D.C. Cir. 1967), overruled on other grounds, United States v. Foster, 783 F.2d 1082 (D.C. Cir. 1986).

But passage of time alone will not support inference that deliberation took place in an alleged premeditated murder. United States v. Mack, 466 F.2d 333 (D.C. Cir.), cert. denied, 409 U.S. 952, 93 S. Ct. 297, 34 L. Ed. 2d 223 (1972).

No particular length of time is necessary for deliberation, as it is not the lapse of time which constitutes the deliberation necessary for first degree murder but the reflection and turning over in the mind of the accused of a design and purpose to kill. Parman v. United States, 399 F.2d 559 (D.C. Cir.), cert. denied, 393 U.S. 858, 89 S. Ct. 109, 21 L. Ed. 2d 126 (1968).

Although no specific amount of time is necessary to demonstrate premeditation and deliberation, the evidence must demonstrate that the accused did not kill impulsively, in the heat of passion, or in an orgy of frenzied activity. Frendak v. United States, App. D.C., 408 A.2d 364 (1979).

While some appreciable time for reflection is required to demonstrate the element of premeditation, such interval need not be long, if the circumstances reveal that the killing was the product of some deliberation rather than the senseless act of a mind abandoned to impulse, passion, or frenzy. Doepel v. United States, App. D.C., 434 A.2d 449, cert. denied, 454 U.S. 1037, 102 S. Ct. 580, 70 L. Ed. 2d 483 (1981).

And jury may consider defendant's mental condition. — In determining whether premeditation and deliberation have been proved beyond a reasonable doubt the jury might consider the testimony of the defendant's abnormal mental condition. United States v. Peterson, 509 F.2d 408 (D.C. Cir. 1974).

But not alleged "diminished responsibility". — In a first degree murder prosecution, there is no defense of diminished responsibility, based on the contention that the defendant's mental condition precluded premeditation. United States v. Bryant, 471 F.2d 1040 (D.C. Cir. 1972), cert. denied, 409 U.S. 1112, 93 S. Ct. 923, 34 L. Ed. 2d 693 (1973).

Intoxication can negate premeditation. — The defendant cannot be convicted of murder in the first degree if, at the time of the commission of the offense he was too drunk to deliberate and premeditate. Sabens v. United States, 40 App. D.C. 440 (1913).

Under this section, evidence of intoxication may be shown for the purpose of providing a lack of capacity to deliberate or premeditate. McAfee v. United States, 111 F.2d 199 (D.C. Cir.), cert. denied, 310 U.S. 643, 60 S. Ct. 1094, 84 L. Ed. 1410 (1940).

Evidence admissible on premeditation issue. — Testimony that one of a number of men outside the murder victim's apartment said they would "upset" the victim "good" is relevant on the issue of premeditation, is not objectionable as hearsay and is admissible, even where the defendant cannot be identified as the source of the declaration. United States v. Mack, 466 F.2d 333 (D.C. Cir.), cert. denied, 409 U.S. 952, 93 S. Ct. 297, 34 L. Ed. 2d 223 (1972).

Evidence as to the circumstances surrounding and the defendant's state of mind during the murder may be admitted on the issue of deliberation and premeditation. United States v. Peterson, 509 F.2d 408 (D.C. Cir. 1974).

A threatening comment made to the murder victim is relevant in proving premeditation and deliberation. Byrd v. United States, App. D.C., 364 A.2d 1215 (1976).

Where the jury can find from the evidence presented that defendant brought the murder weapon with her to the scene of the murder, this, in itself, is highly probative of premeditation and deliberation. Frendak v. United States, App. D.C., 408 A.2d 364 (1979).

Significance of premeditation evidence left to jury. — The significance, on the issue of premeditation, of the victim's being beaten after he was shot is left for interpretation by the jury. United States v. Mack, 466 F.2d 333 (D.C. Cir.), cert. denied, 409 U.S. 952, 93 S. Ct. 297, 34 L. Ed. 2d 223 (1972).

Jury may infer premeditation and deliberation from sufficiently probative facts and circumstances. Head v. United States, App. D.C., 451 A.2d 615 (1982); Hall v. United States, App. D.C., 454 A.2d 314 (1982).

Evidence sufficient to establish premeditation. — Evidence that the deceased was assaulted, bound with rope, tied to a chair and then killed by strangulation from behind while still tightly bound is sufficient to support a

finding of premeditation. *Parman v. United States*, 399 F.2d 559 (D.C. Cir.), cert. denied, 393 U.S. 858, 89 S. Ct. 109, 21 L. Ed. 2d 126 (1968).

Eyewitness testimony describing the murder, together with notes written by the defendant prior to the murder, indicating he contemplated murder and suicide, are sufficient to establish the elements of premeditation and deliberation. *United States v. Sutton*, 426 F.2d 1202 (D.C. Cir. 1969).

Evidence was sufficient to enable jurors to reasonably infer that defendant wrestled officer's gun out of his hand, disabled him with several shots, and, thereafter, in anger at having been struck by a bullet to the hand during the struggle, deliberately shot and killed the officer as he lay on the floor, and fact that shooting occurred immediately upon his confrontation with the officer did not preclude jury from finding premeditation and deliberation, as there was sufficient time between defendant's anger and his action to constitute deliberation and premeditation. *Perry v. United States*, App. D.C., 571 A.2d 1156 (1990).

Evidence of premeditation sufficient to find defendant guilty of murder in the first degree. *Mills v. United States*, App. D.C., 599 A.2d 775 (1991).

Acquittal granted where premeditation not shown. — Where the government is unable to show any motive for the killing nor any prior threats or quarrels which might supply an inference of premeditation and deliberation, a motion for acquittal of first degree murder should be granted. *Austin v. United States*, 382 F.2d 129 (D.C. Cir. 1967), overruled on other grounds, *United States v. Foster*, 783 F.2d 1082 (D.C. Cir. 1986).

Evidence that a defendant, having waited for an officer to arrive in pursuit, initiated a physical struggle with the armed officer, immobilized the officer and grabbed his gun, not shooting immediately, but firing a single shot into the officer's chest, combined with evidence of the defendant's motive to escape, was sufficient for a reasonable juror to conclude that the defendant did not shoot in a panic, but acted with deliberation, having decided to kill the officer in order to secure escape. *Watson v. United States*, App. D.C., 501 A.2d 791 (1985).

An entry from the defendant's diary that referred to his stalking of women other than the victim was admissible to prove the premeditation and deliberation elements of first degree murder. *Adams v. United States*, App. D.C., 502 A.2d 1011 (1986).

Evidence of desire for revenge provided persuasive proof of premeditation and deliberation. *Mills v. United States*, App. D.C., 599 A.2d 775 (1991).

Existence of motive well before commission of crime. — The existence of the motive

well before the commission of the crime substantially reinforces the inference of premeditation and deliberation. *Mills v. United States*, App. D.C., 599 A.2d 775 (1991).

D. Malice.

"Malice" defined. — Malice may be defined as a state of mind showing a heart "regardless of social duty." *Hurt v. United States*, App. D.C., 337 A.2d 215 (1975).

Malice distinguished from specific intent to kill. — Element of malice, the state of mind required for an act of murder, cannot be equated with specific intent to kill: Intent may be, and often is, an ingredient of malice, but never its exact counterpart. *Logan v. United States*, App. D.C., 483 A.2d 664 (1984).

Malice may be shown expressly, or it may be implied from the commission of the act itself. *Bishop v. United States*, 107 F.2d 297 (D.C. Cir. 1939).

Malice may be established by either of 2 standards: (1) A subjective standard, i.e., did the defendant actually intend or foresee that death or serious bodily harm would result from his act; and (2) an objective, "reasonable man" standard, i.e., should the defendant have foreseen that such a result was likely. *Belton v. United States*, 382 F.2d 150 (D.C. Cir. 1967).

Wrongful act intentionally done is not necessarily done with malice. *Green v. United States*, 405 F.2d 1368 (D.C. Cir. 1968), cert. denied, 400 U.S. 997, 91 S. Ct. 473, 27 L. Ed. 2d 447 (1971).

But malice implied in felony murder. — One who kills as he robs is charged with having that degree of malice which is indispensable to murder in the first degree. *Wheeler v. United States*, 165 F.2d 225 (D.C. Cir. 1947), cert. denied, 333 U.S. 829, 68 S. Ct. 448, 92 L. Ed. 1115 (1948); *Wheeler v. Reid*, 175 F.2d 829 (D.C. Cir. 1948).

The law presumes that a person, while attempting to perpetuate a robbery, foresees and intends whatever consequences might naturally result from such an encounter, and it considers this state of mind to be implied malice. *Marcus v. United States*, 86 F.2d 854 (D.C. Cir. 1936).

Under this section malice is implied from the commission of a robbery. *United States v. Branic*, 495 F.2d 1066 (D.C. Cir. 1974); *United States v. Evans*, 652 F.2d 177 (D.C. Cir. 1981).

For the purpose of a felony murder prosecution, malice is implied from the intentional commission of the underlying felony, even where the actual killing may have been accidental. *Shanahan v. United States*, App. D.C., 354 A.2d 524 (1976).

And implied malice obviates need for government to prove that death was "foreseeable" where the homicide occurs during any

of the 5 felonies specified in this section. *United States v. Branic*, 495 F.2d 1066 (D.C. Cir. 1974).

Law infers or presumes no malice from the use of a deadly weapon. *Green v. United States*, 405 F.2d 1368 (D.C. Cir. 1968), cert. denied, 400 U.S. 997, 91 S. Ct. 473, 27 L. Ed. 2d 447 (1971).

Intent cannot be equated with malice as an essential ingredient of murder and the law infers or presumes no malice from the use of a deadly weapon in the commission of a homicide. *United States v. Wharton*, 433 F.2d 451 (D.C. Cir. 1970).

Malice presumed from use of deadly weapon. — See *Patten v. United States*, 42 App. D.C. 239 (1914).

Joinder of separate counts does not work undue prejudice. — Where defendant was charged with assault, murder, rape, sodomy, robbery, and a crime with a weapon, the allegations were separate and distinct, there was little likelihood of the charges being confused or treated as one event, and joinder of the counts therefore did not work undue prejudice against defendant. *Bowyer v. United States*, App. D.C., 422 A.2d 973 (1980).

E. Motive.

Government is not required to prove motive, but the jury may consider absence of such proof as a circumstance in the defendant's favor. *Lanckton v. United States*, 18 App. D.C. 348 (1901).

Motive may be proved, because it may be very important in determining whether or not the accused was actuated by deliberate, premeditated malice. *Lomax v. United States*, 37 App. D.C. 414 (1911); *McHenry v. United States*, 276 F. 761 (D.C. Cir. 1921).

If the fact of the killing is in issue, the prosecutor is permitted to prove that the accused had a motive for killing the deceased, and the accused is permitted to prove that he had no motive. *Collazo v. United States*, 196 F.2d 573 (D.C. Cir.), cert. denied, 343 U.S. 968, 72 S. Ct. 1065, 96 L. Ed. 1364 (1952).

If illegal killing intended, motive immaterial. — If the killing is intended and none of the established legal excuses is pleaded, the motive of the killer is wholly immaterial. *Collazo v. United States*, 196 F.2d 573 (D.C. Cir.), cert. denied, 343 U.S. 968, 72 S. Ct. 1065, 96 L. Ed. 1364 (1952).

Motive not incompatible with sudden rage. — Proof of a motive to kill is not everything; where such a motive arises immediately before the killing, its existence is not incompatible with a sudden overpowering rage. *Mills v. United States*, App. D.C., 599 A.2d 775 (1991).

III. FELONY MURDER.

Prosecution under this provision constitutional. — The fact that this section is

broader than the federal felony murder statute does not deny equal protection to one who is prosecuted under this section. *United States v. Greene*, 489 F.2d 1145 (D.C. Cir. 1973), cert. denied, 419 U.S. 977, 95 S. Ct. 239, 42 L. Ed. 2d 190 (1974).

Purpose of felony murder provision. — The felony murder provision in this section does not embody a legislative purpose to deter the commission of felonies to the point of embracing the coincidence rationale. *United States v. Heinlein*, 490 F.2d 725 (D.C. Cir. 1973).

The purpose of the felony murder provision is to protect human life. *Ellis v. United States*, App. D.C., 395 A.2d 404 (1978), cert. denied, 442 U.S. 913, 99 S. Ct. 2830, 61 L. Ed. 2d 280 (1979).

Elements necessary for felony murder conviction. — In a prosecution for felony murder, to return guilty verdict the jury must find that the killing took place while the defendant, or an aider or abettor, was perpetrating or attempting to perpetrate the felony offense. *United States v. Mack*, 466 F.2d 333 (D.C. Cir.), cert. denied, 409 U.S. 952, 93 S. Ct. 297, 34 L. Ed. 2d 223 (1972).

The elements of felony murder are: (1) A felony is attempted or perpetrated; and (2) during the course of the action the deceased is purposely killed. *United States v. Greene*, 489 F.2d 1145 (D.C. Cir. 1973), cert. denied, 419 U.S. 977, 95 S. Ct. 239, 42 L. Ed. 2d 190 (1974).

Two elements requisite for conviction of felony murder are: (1) The defendant or an accomplice must have inflicted injury on the decedent from which he died; and (2) the injury must have been inflicted in perpetration of a specified felony. *Waller v. United States*, App. D.C., 389 A.2d 801 (1978), cert. denied, 446 U.S. 901, 100 S. Ct. 1824, 64 L. Ed. 2d 253 (1980).

In order to convict on a first degree murder charge under the felony murder statute, the jury must find that the defendant committed a felony in the course of the killing so as to make the killing first degree. *Turner v. United States*, App. D.C., 459 A.2d 1054 (1983).

Since the felony must be proved to establish felony murder, the fact that the named person was the victim of the underlying felony is, by inclusion, a necessary element of proof of felony murder. *Harling v. United States*, App. D.C., 460 A.2d 571 (1983).

Where the predicate felony is attempted armed robbery, first degree felony murder requires that (1) the defendant inflict an injury on the deceased from which the deceased died, and (2) the defendant do so while perpetrating or attempting to perpetrate a specified felony while armed. *West v. United States*, App. D.C., 499 A.2d 860 (1985).

While the government must prove beyond a reasonable doubt all the positive elements of

the underlying felony, there is no requirement that it indict and convict the defendant on that underlying felony in order to secure a conviction for felony murder. *United States v. Greene*, 834 F.2d 1067 (D.C. Cir. 1987), cert. denied, 487 U.S. 1238, 108 S. Ct. 2908, 101 L. Ed. 2d 940 (1988).

The essential elements of felony murder are: (1) During the commission of a felony and in furtherance of a common purpose to commit the offense, (2) either the defendant or an accomplice kills a human being. *Prophet v. United States*, App. D.C., 602 A.2d 1087 (1992).

Essential elements of felony murder while armed are that the defendant, while perpetrating or attempting to perpetrate a specified felony while armed, inflicted an injury on the victim from which he died. *Head v. United States*, App. D.C., 451 A.2d 615 (1982).

Premeditation and intent to kill unnecessary in robbery-murder. — A murder committed in the course of robbing a store is first degree murder although there is no premeditation or intent or desire to kill. *Stewart v. United States*, 214 F.2d 879 (D.C. Cir. 1954).

And government not required to prove sound memory and discretion. — The government is not required to prove that the accused was of sound memory and discretion in a prosecution for felony murder. *United States v. Greene*, 489 F.2d 1145 (D.C. Cir. 1973), cert. denied, 419 U.S. 977, 95 S. Ct. 239, 42 L. Ed. 2d 190 (1974).

In a prosecution for felony murder, the government does not have to affirmatively prove that the defendant was of "sound memory and discretion" both at the time of the underlying felony and the time of the killing. *Shanahan v. United States*, App. D.C., 354 A.2d 524 (1976).

"Any offense" includes federal felonies. — Federal felonies, including the offense of rescuing a federal prisoner, constitute "any offenses" within the meaning of this section. *United States v. Greene*, 489 F.2d 1145 (D.C. Cir. 1973), cert. denied, 419 U.S. 977, 95 S. Ct. 239, 42 L. Ed. 2d 190 (1974).

"Punishable by imprisonment in the penitentiary" defined. — The words "punishable by imprisonment in the penitentiary" do not mean an offense that can be punished only by such imprisonment, but also include an offense that may be so punished. *United States v. Evans*, 28 App. D.C. 264 (1906).

Causation necessary element in arson-murder prosecution. — In an arson and murder prosecution, evidence must be sufficient to establish that the victim's death was caused by the fire. *Green v. United States*, 218 F.2d 856 (D.C. Cir. 1955).

Homicide committed while attempting a robbery is first degree murder. *United States v. Evans*, 28 App. D. C. 264 (1906).

But no conviction where mere preparation occurs. — The intent to rob requisite to a felony murder conviction does not arise where the felony has not progressed beyond mere preparation. *United States v. Bolden*, 514 F.2d 1301 (D.C. Cir. 1975).

And coincidence in time between murder and robbery is insufficient to support conviction. *United States v. Bolden*, 514 F.2d 1301 (D.C. Cir. 1975).

There must be evidence sufficient to support a jury finding that the murder took place during the course of the robbery. However, the mere coincidence in time of a robbery and a murder is insufficient to support a felony murder conviction. *Head v. United States*, App. D.C., 451 A.2d 615 (1982).

Robbery is still in progress so long as essential ingredient of asportation continues. *Carter v. United States*, 223 F.2d 332 (D.C. Cir. 1955), cert. denied, 350 U.S. 949, 76 S. Ct. 324, 100 L. Ed. 827 (1956).

And there may be question as to "break" between robbery and killing. — In a felony murder prosecution, there may be a question as to whether there was an "arrest" of the accused prior to the killing, so as to break the essential link between the robbery and the killing. *Coleman v. United States*, 295 F.2d 555 (D.C. Cir. 1961), cert. denied, 369 U.S. 813, 82 S. Ct. 689, 7 L. Ed. 2d 613 (1962).

Murder liability of felony participants arises under § 22-105. — This section by its terms imposes felony murder liability solely on the person who does the killing, so that other participants in the felony are exposed to first degree murder liability only by virtue of § 22-105. *Christian v. United States*, App. D.C., 394 A.2d 1 (1978), cert. denied, 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315 (1979).

And in accordance with common law vicarious liability. — The felony murder liability of an accomplice must be determined in accordance with common law concepts of vicarious liability. *Christian v. United States*, App. D.C., 394 A.2d 1 (1978), cert. denied, 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315 (1979).

Robbery participant may be convicted of murder. — A person who participates in a robbery but who does not do any shooting or killing may still be convicted of murder. *Wheeler v. United States*, 165 F.2d 225 (D.C. Cir. 1947), cert. denied, 333 U.S. 829, 68 S. Ct. 448, 92 L. Ed. 1115 (1948).

A person who participates in a robbery that results in a killing is guilty of murder in the first degree even though he is only an accomplice. *United States v. Carter*, 445 F.2d 669 (D.C. Cir. 1971), cert. denied, 405 U.S. 932, 92 S. Ct. 988, 30 L. Ed. 2d 806 (1972).

Where the codefendant killed the victim, defendant's conviction of felony murder was appropriate where there was ample evidence that

defendant aided and abetted his codefendant in the crime of robbing the decedent and burglarizing her home. *Adams v. United States*, App. D.C., 466 A.2d 439 (1983).

Only intent to commit underlying felony need be proved. — No distinction is made between principals and aiders and abettors for purposes of felony murder liability, and only intent to commit the underlying felony need be proved. *Waller v. United States*, App. D.C., 389 A.2d 801 (1978), cert. denied, 446 U.S. 901, 100 S. Ct. 1824, 64 L. Ed. 2d 253 (1980).

Underlying felony permits jury to infer required state of mind for conviction of first degree murder. *Hawthorne v. United States*, App. D.C., 476 A.2d 164 (1984).

But homicide must be committed in furtherance of felony's purpose. — To support a conviction of aiding and abetting a felony murder, the homicide must be committed in the course of the felony and in furtherance of the common purpose to commit the felony, rather than merely coincidental with it. *United States v. Bolden*, 514 F.2d 1301 (D.C. Cir. 1975).

This section embraces occasions where the jury may find that the homicidal act fell outside the scope of the felonious crime which the parties undertook to commit. *United States v. Heinlein*, 490 F.2d 725 (D.C. Cir. 1973).

Neither the purpose nor the effect of the amendment to this section which added the provisions commencing "or without purpose so to do" was to render an accomplice liable for a killing without regard to whether it was done in furtherance of the underlying felony. *Christian v. United States*, App. D.C., 394 A.2d 1 (1978), cert. denied, 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315 (1979).

Proof requirement identical whether or not victim of underlying felony and felony murder same. — Whether the victim of the underlying felony is or is not the same person as the victim of the felony murder does not affect the requirement that the underlying felony be proved as a part of the proof of felony murder. *Harling v. United States*, App. D.C., 460 A.2d 571 (1983).

Where one killing is involved, and where the government advances alternate theories of felony murder based upon more than one underlying felony, the accused may not be convicted of more than one felony murder. *Mitchell v. United States*, App. D.C., 629 A.2d 10 (1993), cert. denied, — U.S. —, 114 S. Ct. 1119, 127 L. Ed. 2d 429 (1994).

Accomplice not liable if homicide fresh and independent product of killer's mind. — There is no criminal responsibility on the part of an accomplice if a homicide is a fresh and independent product of the killer's mind, outside of or foreign to the common design. *Christian v. United States*, App. D.C., 394 A.2d

1 (1978), cert. denied, 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315 (1979).

Jury may acquit codefendant not present at scene of killing. — It is within the prerogative of the jury to acquit, on a felony murder charge, a codefendant who was not present at the scene of the killing and to return a verdict of guilty of felony murder as to the defendant, even though both defendants are found guilty of the same robbery. *Coleman v. United States*, 295 F.2d 555 (D.C. Cir. 1961), cert. denied, 369 U.S. 813, 82 S. Ct. 689, 7 L. Ed. 2d 613 (1962).

Assertable defenses in robbery-murder prosecution. — In a prosecution for murder during a robbery, the defendant may contend that the evidence is consistent with lawful possession or with larceny after the homicide. *Womack v. United States*, App. D.C., 339 A.2d 37 (1975).

Voluntary pre-murder abandonment of plan to rob negates guilt. — If a person voluntarily abandons a plan to rob before any fatal shot is fired he is not guilty of felony murder in the first degree. *Mumforde v. United States*, 130 F.2d 411 (D.C. Cir.), cert. denied, 317 U.S. 656, 63 S. Ct. 53, 87 L. Ed. 527 (1942).

But not post-murder disposal of guns and bullets. — The fact that a defendant indicted on a charge of murder in the perpetration of a robbery threw away the gun and bullets after the murder does not, by itself, mean that he can only be found guilty as an accessory after the fact. *Hall v. United States*, 168 F.2d 161 (D.C. Cir.), cert. denied, 334 U.S. 853, 68 S. Ct. 1509, 92 L. Ed. 1775 (1948).

Underlying felony not lesser included offense of felony murder. — While the underlying felony is an element of felony murder, its principal function is as an intent-divining mechanism which permits the jury to infer the state of mind requisite for conviction of murder in the first degree, and as such it is not a lesser included offense of felony murder. *Waller v. United States*, App. D.C., 389 A.2d 801 (1978), cert. denied, 446 U.S. 901, 100 S. Ct. 1824, 64 L. Ed. 2d 253 (1980).

The underlying felony does not "merge" into the murder. *McFadden v. United States*, App. D.C., 395 A.2d 14 (1978).

There can be no merger of armed robbery and felony murder because the societal interests which Congress sought to protect by enacting § 22-3201 (armed robbery) differ from the societal interests which were meant to be protected by the enactment of this section. *Ellis v. United States*, App. D.C., 395 A.2d 404 (1978), cert. denied, 442 U.S. 913, 99 S. Ct. 2830, 61 L. Ed. 2d 280 (1979).

There is nothing in either this section or the armed robbery statute to indicate that Congress intended to vitiate conviction for the underlying crime whenever death resulted dur-

ing its commission. *Ellis v. United States*, App. D.C., 395 A.2d 404 (1978), cert. denied, 442 U.S. 913, 99 S. Ct. 2830, 61 L. Ed. 2d 280 (1979).

Second degree murder appropriate lesser included offense under certain circumstances. — In particular factual settings, second degree murder constitutes an appropriate lesser included offense of first degree premeditated murder and/or first degree felony murder. *Turner v. United States*, App. D.C., 459 A.2d 1054 (1983).

Defendant can be convicted of both first degree burglary and felony murder. *Blango v. United States*, App. D.C., 373 A.2d 885 (1977).

Indictment and conviction for both felony murder and premeditated murder possible. — There is no legal obstacle to indicting and convicting a person of both felony murder and premeditated murder where those charges arise from a single homicide, because the offenses have different elements: Premeditated murder is a slaying done with "deliberate and premeditated malice," while felony murder occurs in the course of certain enumerated felonies. *Christian v. United States*, App. D.C., 394 A.2d 1 (1978), cert. denied, 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315 (1979).

No legal obstacle prevents the prosecutor from indicting and the jury from convicting a defendant of both first degree premeditated murder and felony murder under this section. *McFadden v. United States*, App. D.C., 395 A.2d 14 (1978).

A single killing may give rise to convictions for both premeditated murder and felony murder so long as concurrent sentences are imposed. *Harling v. United States*, App. D.C., 460 A.2d 571 (1983).

Underlying felony merges into felony murder conviction so that the convictions for the felonies of rape, robbery, and burglary, which underlay a felony murder conviction, should be vacated. *Leasure v. United States*, App. D.C., 458 A.2d 726 (1983).

Because appellants' convictions for felony murder and the underlying felony of armed burglary merge, the Court of Appeals remanded the case with instructions to vacate the armed burglary convictions and sentence accordingly. *Williams v. United States*, App. D.C., 483 A.2d 292 (1984), cert. denied, 474 U.S. 906, 106 S. Ct. 275, 88 L. Ed. 2d 236 (1985).

Furtherance instruction required to convict aider and abettor. — The government must prove that a killing was done in furtherance of an underlying felony when it seeks to make an aider and abettor who did not actually do the killing liable for felony murder. In such a case the court must give an appropriate furtherance instruction. There is no requirement in the law, however, that the government prove the killing was done in furtherance

of the felony in order to convict the actual killer of felony murder; hence, the actual killer is not entitled to a furtherance. *Butler v. United States*, App. D.C., 614 A.2d 875, cert. denied, 506 U.S. 1009, 113 S. Ct. 625, 121 L. Ed. 2d 558 (1992).

Defendant can be sentenced for both felony murder during burglary while armed and felony murder during attempted armed robbery arising out of the same shooting of a single victim since the defendant violated 2 statutory provisions requiring proof of different elements. *Adams v. United States*, App. D.C., 466 A.2d 439 (1983).

Multiple convictions on alternative theories prohibited. — Where one killing is involved, and the government advances alternative theories of felony murder based upon more than one underlying felony, the accused may not be convicted of more than one felony murder. *Catlett v. United States*, App. D.C., 545 A.2d 1202 (1988), cert. denied, 488 U.S. 1017, 109 S. Ct. 814, 102 L. Ed. 2d 803 (1989).

In light of defendant's conviction for first degree murder, his felony murder conviction was vacated. *Mitchell v. United States*, App. D.C., 629 A.2d 10 (1993), cert. denied, — U.S. —, 114 S. Ct. 1119, 127 L. Ed. 2d 429 (1994).

An attempted burglary may be the felony underlying a charge of felony murder. *Harris v. United States*, App. D.C., 373 A.2d 590 (1977).

Homicide during housebreaking first degree murder. — One who commits a homicide while engaged in housebreaking may be charged with first degree murder. *Monroe v. United States*, 10 F.2d 645 (D.C. Cir. 1925).

Even a purposeless killing of another during an armed housebreaking constitutes first degree murder. *Harris v. United States*, App. D.C., 377 A.2d 34 (1977).

But homicide must be committed within scope of offense. — Evidence that a homicide was committed within the scope of an attempted armed burglary, and not merely coincident thereto, sustains a conviction of felony murder. *Harris v. United States*, App. D.C., 377 A.2d 34 (1977).

As where killer preparing to leave premises. — A killing of a person which occurs while the killer is securing his loot and is preparing to leave the premises into which he has broken is a homicide committed in the perpetration of a housebreaking. *United States v. Naples*, 192 F. Supp. 23 (D.D.C. 1961), rev'd on other grounds, 307 F.2d 618 (D.C. Cir. 1962).

Small pen knife is not a "dangerous weapon" under this section. *Cooper v. United States*, App. D.C., 368 A.2d 554 (1977).

IV. PROCEDURE.

A. In General.

Person detained on unrelated charges may be interrogated on murder. — The

interrogation of an arrestee in connection with a murder following an arrest for a totally unrelated offense is not improper where the arrestee has been advised of and has waived his constitutional rights. *King v. United States*, App. D.C., 370 A.2d 1370 (1977).

And may confess thereto. — The fact that a person is in the temporary care of the police on other charges at the time of making a written confession to murder does not render the confession inadmissible. *Tyler v. United States*, 193 F.2d 24 (D.C. Cir. 1951), cert. denied, 343 U.S. 908, 72 S. Ct. 639, 96 L. Ed. 1326 (1952).

Joinder found proper. — Charges against one accused of first degree murder, and one accused of being an accessory after the fact by threatening a material witness can be joined in a single indictment. *Jackson v. United States*, App. D.C., 329 A.2d 782 (1974), cert. denied, 423 U.S. 851, 96 S. Ct. 95, 46 L. Ed. 2d 74 (1975).

No election required between substantive and accessory counts. — The failure to require an election between a substantive count and an accessory count in an indictment for murder is not prejudicial. *Dean v. United States*, App. D.C., 377 A.2d 423 (1977).

Severance of charge required. — Evidence of murder and attempted murder occurring one week after incident leading to simple assault charge would have created an extreme risk of prejudice no matter what instructions the judge gave regarding the limited use of the evidence, if admitted at a trial of the simple assault; thus the charges should have been severed. *Parks v. United States*, App. D.C., 656 A.2d 1137, cert. denied, — U.S. —, 116 S. Ct. 198, 133 L. Ed. 2d 133 (1995).

Refusal to sever counts found proper. — Where the offenses of armed robbery of one person and attempted armed robbery and felony murder of another are committed at approximately the same place, within minutes of each other, and are similar and involve a great deal of overlapping evidence, and where the defendant makes no convincing showing that he has important testimony concerning one count and a strong need to refrain from testifying on the other, the court may refuse to sever the two offenses. *In re F.D.P.*, App. D.C., 352 A.2d 378 (1976).

Where a robbery and a felony murder, although unrelated as to place, are so closely related in time as to almost constitute a continuing transaction and the evidence of the robbery would be admissible in a separate trial for felony murder, the court may deny a severance. *Calhoun v. United States*, App. D.C., 369 A.2d 605 (1977).

In a trial for murder in which the victim was stabbed with a knife, the trial court did not err in denying the defendant's motion to sever the

3rd count of the indictment charging illegal possession of a sawed-off shotgun, since a reasonable mind could have concluded from the evidence that the defendant had had the shotgun in his possession when he assaulted the deceased and that he could have used either the gun or the knife in that assault. *Dockery v. United States*, App. D.C., 385 A.2d 767 (1978).

Refusal to sever counts found improper. — The refusal to grant a trial severance for several crimes, including first degree murder, arising out of separate robberies is prejudicial where there is the danger that the evidence with respect to robberies will cumulate in the jurors' minds and tend to prove the defendant guilty of each. *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966).

Court may dismiss count for lack of proof following refusal to sever. — Where a count of an indictment charging the defendant with numerous offenses, including murder, is dismissed for failure of proof and the indictment is retyped without this count, the defendant is not prejudiced by the court's prior refusal to sever. *United States v. Joyner*, 492 F.2d 650 (D.C. Cir.), cert. denied, 419 U.S. 852, 95 S. Ct. 94, 42 L. Ed. 2d 83 (1974).

Refusal to sever defendants found proper. — The refusal to grant multiple defendants jointly indicted on a charge of murder separate trials is not an abuse of discretion where the court limits the effect of the evidence which is competent against one defendant and incompetent as to the others. *Hall v. United States*, 168 F.2d 161 (D.C. Cir.), cert. denied, 334 U.S. 853, 68 S. Ct. 1509, 92 L. Ed. 1775 (1948).

The refusal to grant a severance in a prosecution for murder, is not prejudicial due to the fact that the evidence against a codefendant is quantitatively and qualitatively greater than the evidence against the defendant where the evidence against the defendant is both substantial and compelling, and where the jury specifically instructed to determine the guilt of each defendant by considering only his own conduct and the evidence which applies to him. *United States v. Leonard*, 494 F.2d 955 (D.C. Cir. 1974).

In a first degree murder prosecution, where there is adequate evidence that all of the defendants were acting in concert no severance is required. *Byrd v. United States*, App. D.C., 364 A.2d 1215 (1976).

Prompt arraignment and speedy trial rights found upheld. — There is no violation of the rule requiring prompt arraignment, nor of the speedy trial amendments to the federal Constitution, where the defendant is presented in court on the day he surrenders, no confession is introduced against him, the evidence establishes all the basic elements of the crime, and the defendant takes the stand and describes his participation in the murder. *Coleman v. United*

States, 295 F.2d 555 (D.C. Cir. 1961), cert. denied, 369 U.S. 813, 82 S. Ct. 689, 7 L. Ed. 2d 613 (1962).

Speedy trial not denied where delay caused by defendant's incapacity. — The dismissal of an indictment charging murder, for lack of a speedy trial is not required where the delay is caused by the defendant's mental incapacity to stand trial. *United States v. Lancaster*, 408 F. Supp. 225 (D.D.C. 1976).

Police justified in seizing items in plain view. — Following a lawful arrest for murder, the police, on inadvertently discovering items similar to those used in the killing, are justified in seizing them pursuant to the plain view exception to the search warrant requirement. *United States v. Sheard*, 473 F.2d 139 (D.C. Cir. 1972), cert. denied, 412 U.S. 943, 93 S. Ct. 2784, 37 L. Ed. 2d 404 (1973); *Pittman v. United States*, App. D.C., 375 A.2d 16 (1977).

Failure of court to screen out certain jurors sua sponte constitutional. — In a prosecution for murder, the defendant is not denied her right to an impartial jury where the court fails to, sua sponte, screen out persons prejudiced against an insanity defense. *Harris v. United States*, App. D.C., 377 A.2d 34 (1977).

It is in the discretion of the court to permit jury to separate in a homicide case, and his action in that respect will not be reviewed unless it appears affirmatively that prejudice resulted to the defendant. *McHenry v. United States*, 276 F. 761 (D.C. Cir. 1921).

Alleged police murderer is not entitled to a jury free of policemen's relatives. *United States v. Caldwell*, 543 F.2d 1333 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087, 96 S. Ct. 877, 47 L. Ed. 2d 97 (1976).

Judge may appoint a different attorney to a case on the ground that he considers counsel too inexperienced to try a first degree murder case. *Baylor v. United States*, App. D.C., 360 A.2d 42, cert. denied, 429 U.S. 1024, 97 S. Ct. 643, 50 L. Ed. 2d 626 (1976).

Court has power to order government to produce eyewitnesses' names. — The court has the power to order the government in first degree murder prosecution to produce the names of any alleged eyewitnesses to the crime for use by the defense. *United States v. Holmes*, App. D.C., 343 A.2d 272 (1975).

Statements not helpful to defense may be withheld. — Where statements given by witnesses to the police during a murder investigation do not include evidence that is relevant or material or that is helpful in the defense or which will lead to evidence that is relevant or material or that tends to be exculpatory, the statements may be withheld from the defense. *United States v. Bowles*, 488 F.2d 1307 (D.C. Cir. 1973), cert. denied, 415 U.S. 991, 94 S. Ct. 1591, 39 L. Ed. 2d 888 (1974).

B. Indictment.

Indictment should follow section's language. — It is a safe rule, in a murder indictment, to follow the language of this section. *United States v. Evans*, 28 App. D.C. 269 (1906).

But certain language unnecessary. — It is not necessary to charge in the indictment that the accused was of sound mind and discretion. *Hill v. United States*, 22 App. D.C. 395 (1903).

An indictment charging a defendant with a felony murder charges first degree murder even where it omits an allegation that the accused was of sound memory and discretion. *Coleman v. United States*, 295 F.2d 555 (D.C. Cir. 1961), cert. denied, 369 U.S. 813, 82 S. Ct. 689, 7 L. Ed. 2d 613 (1962).

An indictment charging first degree murder is not defective even though it does not contain the phrase "being of sound memory and discretion." *Jones v. United States*, 296 F.2d 398 (D.C. Cir. 1961), cert. denied, 370 U.S. 913, 82 S. Ct. 1260, 8 L. Ed. 2d 406 (1962).

An allegation of sanity is not required in an indictment. *Jones v. United States*, 296 F.2d 398 (D.C. Cir. 1961), cert. denied, 370 U.S. 913, 82 S. Ct. 1260, 8 L. Ed. 2d 406 (1962).

An indictment for murder is not defective for want of an express allegation of an intent to kill. *Hamilton v. United States*, 26 App. D.C. 382 (1905).

In an indictment which charges the defendant with killing another while attempting to rob him, the intent to kill, since it is not an ingredient of the crime, need not be alleged or proved. *Goodall v. United States*, 180 F.2d 397 (D.C. Cir.), cert. denied, 339 U.S. 987, 70 S. Ct. 1009, 94 L. Ed. 1389 (1950).

An indictment charging the commission of a murder in a house situated in the District is not defective because it does not particularly describe the location of the house. *Lanckton v. United States*, 18 App. D.C. 348 (1901).

And certain language found sufficient. — Where an indictment informs the defendant in plain language that he is accused of murder in the first degree, it must stand. *Goodall v. United States*, 180 F.2d 397 (D.C. Cir.), cert. denied, 339 U.S. 987, 70 S. Ct. 1009, 94 L. Ed. 1389 (1950).

A defendant can be convicted of second degree murder under a felony murder indictment where the indictment contains the language that he "unlawfully and feloniously did murder." *Jackson v. United States*, 313 F.2d 572 (D.C. Cir. 1962).

Although an indictment did not contain an allegation of specific intent to kill, its sufficiency was determined by practical rather than technical considerations, and the imperfection was not prejudicial. *Hackney v. United States*,

App. D.C., 389 A.2d 1336 (1978), cert. denied, 439 U.S. 1132, 99 S. Ct. 1054, 59 L. Ed. 2d 95 (1979).

Probable cause. — Indictment by the grand jury on several charges, including felony murder premised on an attempted armed robbery of decedent, determined the existence of probable cause that defendant committed the predicate felony of robbing or attempting to rob the decedent. *Scott v. United States*, App. D.C., 633 A.2d 72 (1993).

Charging second degree murder on charge of felony murder. — Second degree murder is a lesser included offense of felony murder; thus, even in absence of indictment charging second degree murder, it was proper for court, in an indictment accusing defendant of first degree felony murder, to instruct the jury to consider whether the evidence established murder in the second degree as the commission of the offense was 1 of the elements encompassed in the indictment. *Towles v. United States*, App. D.C., 521 A.2d 651, cert. denied, 483 U.S. 1008, 107 S. Ct. 3236, 97 L. Ed. 2d 741 (1987).

Proof of means of commission of homicide need not conform strictly to averment of such means in the indictment, for it is sufficient if the means proved agree in substance with that charged. *Hamilton v. United States*, 26 App. D.C. 382 (1905).

C. Defenses.

Excessive blows may be struck in self-defense. — Excessive blows do not require a manslaughter verdict even where they were struck in the sudden heat of passion where the defendant actually and reasonably believed he was fighting to save his life or to avert serious bodily injury. *Inge v. United States*, 356 F.2d 345 (D.C. Cir. 1966).

Showing necessary to justify self-defense. — Before one can be permitted to take a life under the apprehension that he is in danger of death or serious bodily harm from the violence of another, it must appear that he had a reasonable right to believe, from all the facts and circumstances presented to his mind, that he was in such danger. *Sacrini v. United States*, 38 App. D.C. 371 (1912).

But not necessary to prove reasonable occasion for escape. — Where self-defense is raised, it is not necessary to prove that there was no reasonable occasion for the defendant to escape from the conflict. *Marshall v. United States*, 45 App. D.C. 373 (1916).

If a man reasonably believes that he is in immediate danger of death or grievous bodily harm from his assailant, he may stand his ground, and if he kills him he does not exceed the bounds of lawful self-defense. *Price v. United States*, 276 F. 628 (D.C. Cir. 1922).

Reasonable deadly force allowed. — It is reasonable to use a deadly weapon in a defense against an attack with a deadly weapon, but only to the extent reasonably required to save a life or to avert serious bodily harm. *Inge v. United States*, 356 F.2d 345 (D.C. Cir. 1966).

A killing by stabbing is not justifiable as self-defense in the absence of anything to show that the defendant suffered such pain, or was apprehensive of such bodily harm, as to suggest the use of a deadly weapon. *Grant v. United States*, 28 App. D.C. 169 (1906).

Self-defense claim a jury question. — Whether defendant has forfeited his right to any imperfect self-defense claim, because he voluntarily placed himself in a position likely to provoke trouble, is a jury question. *Swann v. United States*, App. D.C., 648 A.2d 928 (1994).

Evidence considered by jury in self-defense claim. — Where self-defense is raised, the jury should consider the words and acts of the deceased and any threats against the accused at the time of the killing. *Wallace v. United States*, 18 App. D.C. 152 (1901).

In a homicidal case where the defense is self-defense, it is proper to introduce incidents or specific acts of violence within the knowledge of the witness or coming under his observation. *Marshall v. United States*, 45 App. D.C. 373 (1916).

When a defendant claims self-defense, there must be substantial evidence that the deceased attacked him for the defendant's testimonial evidence of uncommunicated threats of the deceased against the defendant to be admissible. *Kleinbart v. United States*, App. D.C., 426 A.2d 343 (1981).

Evidence of victim's bellicose and violent character admissible to support self-defense claim. — An accused claiming self-defense in a homicide prosecution may attempt to show that the decedent was the aggressor by showing that the dead person was a bellicose and violent individual and evidence in that regard is deemed relevant. *Johnson v. United States*, App. D.C., 452 A.2d 959 (1982).

Burden of proof on raising insanity defense. — Where a defendant accused of murder introduces evidence that, on the date thereof, he was suffering from a mental disease or defect, it becomes the duty of the government to prove him sane beyond a reasonable doubt at the time of the commission of the crime. *Carey v. United States*, 296 F.2d 422 (D.C. Cir. 1961).

Where an insanity defense is raised, the government must meet its burden of proving that the defendant was not suffering from a mental disease or defect on the date of the offense, or, if he was, that the offense was not a product of the illness. *United States v. Green*, 463 F.2d 1313 (D.C. Cir. 1972).

Brain abnormality not necessary for insanity acquittal. — The defendant cannot be

acquitted by reason of insanity only if he suffered from an abnormality due to a physical deterioration of or injury to the brain. *Stewart v. United States*, 214 F.2d 879 (D.C. Cir. 1954).

Holding a bifurcated trial for an insanity defense is not improper. *United States v. Green*, 463 F.2d 1313 (D.C. Cir. 1972).

But also not required. — The court does not abuse its discretion in a murder prosecution by denying a motion for a bifurcated trial with 2 juries on the issues of insanity and the defense to the merits. *Parman v. United States*, 399 F.2d 559 (D.C. Cir.), cert. denied, 393 U.S. 858, 89 S. Ct. 109, 21 L. Ed. 2d 126 (1968).

In a prosecution for murder, the court does not abuse its discretion in denying a request for different juries to try the merits and an insanity defense. *Shanahan v. United States*, App. D.C. 354 A.2d 524 (1976).

Court need not defer rendering of verdict until after codefendant's bifurcated trial. — The court does not abuse its discretion in denying a defendant's request that the jury defer rendering a verdict as to him until after resolution of the insanity phase of his codefendant's bifurcated trial despite a contention that expert medical testimony as to the codefendant's mental condition is necessary for his duress defense. *Shanahan v. United States*, App. D.C., 354 A.2d 524 (1976).

Evidence on insanity issue for jury. — The evidence in a homicide prosecution on the issue of a defense of insanity is for the jury. *Turberville v. United States*, 303 F.2d 411 (D.C. Cir.), cert. denied, 370 U.S. 946, 82 S. Ct. 1607, 8 L. Ed. 2d 813 (1962).

Disposition of defendant upon finding of insanity. — In a prosecution for first degree murder, upon a finding on insanity, the defendant is immediately committed for a mental examination, after which there is another judicial determination as to whether he is still suffering from mental illness and whether he is dangerous to himself and others, and if he is found to be suffering from mental illness but is not dangerous to himself or others he will be released. *United States v. Brown*, 490 F.2d 758 (D.C. Cir. 1973).

Absent prejudice, new insanity standard requires no reversal. — A remand and a retrial of a homicide case following an adoption of a new standard for an insanity defense is not required where the defendant was not prejudiced by the application of the older standard. *Bethea v. United States*, App. D.C., 365 A.2d 64 (1976), cert. denied, 433 U.S. 911, 97 S. Ct. 2979, 53 L. Ed. 2d 1095 (1977).

Failure to secure proper treatment no defense. — One who, in striking another, inflicts a blow which may not be mortal in and of itself but starts a chain of causation which leads to death, is guilty of homicide, even if the victim contributes to his own death or hastens

it by failing to take proper treatment. *United States v. Hamilton*, 182 F. Supp. 548 (D.D.C. 1960).

Nor is subsequent inadvertent fatal accident. — The defendant is guilty of murder if the deceased, in seeking to escape a violent assault by the accused, had a well-grounded belief that he would take her life or inflict serious injury and subsequently inadvertently gets killed in an accident as a result. *Norman v. United States*, 20 App. D.C. 494 (1902).

Defense allowed to argue identity issue. — The defense counsel must be allowed an opportunity to argue as to the identity of the individual who in fact committed the murder. *Peoples v. United States*, App. D.C., 329 A.2d 446 (1974).

And suggest accessory committed murder. — The defense counsel may suggest that an accessory committed the murder. *United States v. DeLoach*, 504 F.2d 185 (D.C. Cir. 1974), cert. denied, 426 U.S. 909, 96 S. Ct. 2232, 48 L. Ed. 2d 834 (1976).

But motive not always material to defense. — In a first degree murder prosecution, the motive for the killing is not always a material element in the defense. *Collazo v. United States*, 196 F.2d 573 (D.C. Cir.), cert. denied, 343 U.S. 968, 72 S. Ct. 1065, 96 L. Ed. 1364 (1952).

D. Evidence.

Accused in murder prosecution is required to plead and prove his own case and is responsible for the production in court of any necessary witnesses. *Thomas v. United States*, 158 F.2d 97 (D.C. Cir. 1946), cert. denied, 331 U.S. 822, 67 S. Ct. 1303, 91 L. Ed. 1838 (1947).

Prosecutor may question defendant as to failure to report murder. — The prosecutor may question the defendant as to his pre-arrest failure to report the murder he claims to have witnessed. *Pittman v. United States*, App. D.C., 375 A.2d 16 (1977).

And may question psychiatrist as to prior defense testimony. — In a prosecution for murder, the court does not err in permitting a cross-examination of a psychiatrist called by the defense as to whether he, in prior cases in which he testified, ever found a defendant to be without mental disease or defect. *Harris v. United States*, App. D.C., 377 A.2d 34 (1977).

Expert may examine weapon during trial in absence of defendant. — An examination of a murder weapon by a ballistics expert during the trial may be made in the absence of the defendant. *Goodall v. United States*, 180 F.2d 397 (D.C. Cir.), cert. denied, 339 U.S. 987, 70 S. Ct. 1009, 94 L. Ed. 1389 (1950).

Witness in proximity to murder has independent source for identification. —

Where a witness to a murder was in close proximity to the murderer and had ample opportunity to observe him, he has an independent source from which he might attempt an in-court identification. *United States v. Brown*, 461 F.2d 134 (D.C. Cir. 1972).

Threatening comment by 1 defendant considered against all codefendants present. —

There is no need in a first degree murder prosecution to limit to 1 defendant alone the consideration of a threatening comment made by him to the victim where all the defendants were together when the threat was made and during the subsequent events leading to the murder. *Byrd v. United States*, App. D.C., 364 A.2d 1215 (1976).

Evidence of prior gun possession and threats held admissible without cautionary instruction. —

In trial involving charges for fatal shooting, failure of trial court sua sponte to give any cautionary instruction on the prior gun possession and prior threats evidence was not plain error, where the relevance of the evidence was properly noted by counsel in their closing arguments, its relationship to issues before the jury was not complex or confused, and defense counsel's decision not to request a cautionary instruction was clearly consistent with his trial strategy. *Jones v. United States*, App. D.C., 477 A.2d 231 (1984).

Admission of evidence discretionary. —

In trial for rape and murder, court did not abuse its discretion in allowing admission of evidence of crime with similar scheme and in denying admission of evidence that defendant was wrongly accused of rape. *Gates v. United States*, App. D.C., 481 A.2d 120 (1984), cert. denied, 470 U.S. 1058, 105 S. Ct. 1772, 84 L. Ed. 2d 832 (1985).

Government entitled to rebut evidence of defendant's good character. —

If during the presentation of his case, the defendant offers testimony of his own good character, the government is then entitled to rebut the evidence of defendant's good character, either by cross-examining appellant's witnesses or presenting its own witnesses. *Obregon v. United States*, App. D.C., 423 A.2d 200 (1980), cert. denied, 452 U.S. 918, 101 S. Ct. 3054, 69 L. Ed. 2d 422 (1981).

Evidence found admissible. — In a murder prosecution, where the testimony of a witness is substantially the same as her pretrial written statement, any error in permitting the statement to be introduced in evidence is not prejudicial. *Burton v. United States*, 151 F.2d 17 (D.C. Cir.), cert. denied, 326 U.S. 789, 66 S. Ct. 473, 90 L. Ed. 479 (1945).

In a first degree murder prosecution, evidence that the defendant deliberately pursued and shot another person immediately after he

shot the deceased is admissible to show that the shooting of the deceased was not an accident in an attempt at self-defense. *Copeland v. United States*, 152 F.2d 769 (D.C. Cir. 1945), cert. denied, 328 U.S. 841, 66 S. Ct. 1010, 90 L. Ed. 1615 (1946).

In a murder prosecution, receiving evidence that the murder weapon was stolen is not an error in the absence of any evidence showing that the defendant stole the weapon or received it knowing it to be stolen. *Hall v. United States*, 168 F.2d 161 (D.C. Cir.), cert. denied, 334 U.S. 853, 68 S. Ct. 1509, 92 L. Ed. 1775 (1948).

In a prosecution for murder committed in the perpetration of a robbery, where the defense suggests that the victim died of a heart attack, exhibiting the victim's clothing to the jury and showing the bullet hole in the back of coat is not improper. *Hall v. United States*, 168 F.2d 161 (D.C. Cir.), cert. denied, 334 U.S. 853, 68 S. Ct. 1509, 92 L. Ed. 1775 (1948).

Evidence of 1 defendant's activities prior to an alleged homicide is admissible in a prosecution of all the defendants where there is a close proximity, in time, place and persons, between these activities and the subsequent homicide. *Turberville v. United States*, 303 F.2d 411 (D.C. Cir.), cert. denied, 370 U.S. 946, 82 S. Ct. 1607, 8 L. Ed. 2d 813 (1962).

Testimony of the circumstances surrounding the defendant's arrest on another charge may be admitted to show consciousness of guilt of the alleged murder. *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966).

A suspicion of the defendant that some understanding existed whereby a witness who participated in the murder might not be prosecuted or that he believed he would not be is not sufficient to exclude his otherwise admissible testimony as to the details of crime. *Brown v. United States*, 375 F.2d 310 (D.C. Cir. 1966), cert. denied, 388 U.S. 915, 87 S. Ct. 2133, 18 L. Ed. 2d 1359 (1967).

An incriminating statement by badly burned victim during a hospital interview immediately preceding her death, in the course of which she states that she feels she is going to die, is admissible as dying declaration. *United States v. Barnes*, 464 F.2d 828 (D.C. Cir. 1972), cert. denied, 410 U.S. 986, 93 S. Ct. 1514, 36 L. Ed. 2d 183 (1973).

An admission of a photograph of the decedent's body is not an error in a homicide case where the photograph is not so gruesome as to create a risk of inflaming the jury. *United States v. Smith*, 490 F.2d 789 (D.C. Cir. 1974); *Womack v. United States*, App. D.C., 339 A.2d 37 (1975); *Pittman v. United States*, App. D.C., 375 A.2d 16 (1977).

Testimony by accomplices as to statements made to them by the defendant during the commission of murder are admissible. *United States v. Leonard*, 494 F.2d 955 (D.C. Cir. 1974).

Testimony concerning other illegal acts is admissible in a murder prosecution where it has a direct bearing on the defendant's motive. *Jackson v. United States*, App. D.C., 329 A.2d 782 (1974), cert. denied, 423 U.S. 851, 96 S. Ct. 95, 46 L. Ed. 2d 74 (1975).

Evidence of prior offenses is admissible to show *modus operandi*. In *re A.L.S.*, App. D.C., 377 A.2d 1149 (1977).

Prior possession of the physical means of committing the murder is some evidence of the probability of guilt and is therefore admissible. *Coleman v. United States*, App. D.C., 379 A.2d 710 (1977).

The admission of a post-mortem photograph of a rape/murder victim into evidence in the trial of her accused assailants was probative in that it identified the victim and showed the extent of injuries. *Leasure v. United States*, App. D.C., 458 A.2d 726 (1983).

The trial court did not abuse its discretion in admitting into evidence the photographs of the decedent at the scene of his murder given the fact that the photos had probative value in confirming the identity of the victim, the location of the offense, the cause of death, and appellant's malice and premeditation. *Leasure v. United States*, App. D.C., 458 A.2d 726 (1983).

Admission of evidence concerning defendant's parole papers was not an abuse of discretion. *Minick v. United States*, App. D.C., 506 A.2d 1115, cert. denied, 479 U.S. 836, 107 S. Ct. 133, 93 L. Ed. 2d 76 (1986).

Evidence found inadmissible. — In a murder prosecution, evidence of an uncommunicated complaint which the victim made prior to the offense must be excluded where the complaint is not a threat and there is no claim of self-defense. *Fisher v. United States*, 149 F.2d 28 (D.C. Cir. 1945), aff'd, 328 U.S. 463, 66 S. Ct. 1318, 90 L. Ed. 2d 1382 (1946), overruled on other grounds, *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

In a murder prosecution, there is no error in striking testimony presented to establish the deceased's reputation for violence, where the testimony is cumulative, vague and uncertain. *Hurt v. United States*, App. D.C., 337 A.2d 215 (1975).

E. Instructions.

Prosecutor's comments found proper. — The government may refer to the defendant's inability, following a murder, to explain his prior whereabouts satisfactorily. *Whalen v. United States*, App. D.C., 379 A.2d 1152 (1977), rev'd on other grounds, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980).

A prosecutorial statement in a complex murder trial with numerous witnesses that the

government's version of the case is uncontested is not a comment on the failure of the accused to testify. *Peoples v. United States*, App. D.C., 329 A.2d 446 (1974).

Improper conduct of the prosecutor requires reversal where it might affect the verdict on the issue of self-defense or the degree of homicide. *Belton v. United States*, 259 F.2d 811 (D.C. Cir. 1958).

Prosecutor's comments found improper. — The prosecutor's characterization of killings as "executions" and "assassinations" is improper. *United States v. DeLoach*, 504 F.2d 185 (D.C. Cir. 1974), cert. denied, 426 U.S. 909, 96 S. Ct. 2232, 48 L. Ed. 834 (1976).

In a prosecution for murder, the prosecutor cannot imply that the defendant will shortly be released if the jury does not reject her insanity defense. *Harris v. United States*, App. D.C., 377 A.2d 34 (1977).

Highly prejudicial comments on 1 defendant may lead to reversal of codefendant's conviction. — Where the prosecutor's comments on the insanity defense of a defendant are so highly prejudicial as to require a reversal, the conviction of a codefendant who asserted a lack of intent to commit murder must also be nullified. *United States v. Hawkins*, 480 F.2d 1151 (D.C. Cir. 1973).

Defense counsel may fail to discuss alibi defense where testimony contradictory. — Where the alibi witnesses seriously contradict each other, the defense counsel may fail to discuss the alibi defense in his summation. *Coleman v. United States*, App. D.C., 379 A.2d 710 (1977).

Charge in homicide prosecution should focus primarily on the defendant's actual thought processes in terms of meditation and the conscious weighing of alternatives, the appreciable time element being subordinate. *Austin v. United States*, 382 F.2d 129 (D.C. Cir. 1967), overruled on other grounds, *United States v. Foster*, 783 F.2d 1082 (D.C. Cir. 1986).

But "appreciable time" charge should be given where requested. — An "appreciable time" charge in a homicide prosecution is a meaningful way to convey to the jury the core meaning of premeditation and deliberation and should be given where specifically requested by the defense. *Austin v. United States*, 382 F.2d 129 (D.C. Cir. 1967), overruled on other grounds, *United States v. Foster*, 783 F.2d 1082 (D.C. Cir. 1986).

Proper to instruct on accomplice theory where evidence warrants. — Where a robbery is part of a general holdup in the perpetration of which a person is killed in an incident separate from but related to the defendant's actions, he is not entitled to an instruction that 2 separate robberies were committed or that he can be convicted only of being an accessory after the fact or of robbery. *Wheeler v. United*

States, 165 F.2d 225 (D.C. Cir. 1947), cert. denied, 333 U.S. 829, 68 S. Ct. 448, 92 L. Ed. 1115 (1948); *Wheeler v. Reid*, 175 F.2d 829 (D.C. Cir. 1948).

Failure to give standard jury instruction did not foreclose presenting defense.

— Although the trial court in a felony murder case should have given the standard jury instruction that the felony murder liability of an accomplice required that the killing occur in the course of the felony and in furtherance of the common purpose to commit the felony, instead of instructing the jury that it could convict if it found that the killings occurred “in the course of the felony,” there was no reversible error because the instruction given did not prevent defense counsel from arguing to the jury that the killings were outside the scope of and foreign to the original plan or design. *Christian v. United States*, App. D.C., 394 A.2d 1 (1978), cert. denied, 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315 (1979).

Proper to instruct on both aider and abettor and actual killer theories. — Even though the evidence intended to prove that the defendant was the actual killer, it was not inconsistent or misleading for the trial court to instruct on the theory that he was an aider and abettor as well as the actual killer because the greater participation in the offense includes the lesser, and the legal effect is the same. *Hackney v. United States*, App. D.C., 389 A.2d 1336 (1978), cert. denied, 439 U.S. 1132, 99 S. Ct. 1054, 59 L. Ed. 2d 95 (1979).

And jury may be instructed on second degree murder as a lesser included offense where the indictment is solely for felony murder. *Fuller v. United States*, 407 F.2d 1199 (D.C. Cir. 1967), cert. denied, 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125 (1969).

And jury must be instructed on elements of underlying felony. — The instructions must set forth the essential elements constituting the crime of attempted robbery where it is the underlying felony upon which a conviction of felony murder is sought. *United States v. Williams*, 463 F.2d 958 (D.C. Cir. 1972).

Instruction on lesser included offenses not necessary. — Where the defendant's evidence in a prosecution for felony murder and armed robbery was so incredible that it provided no rational basis for a lesser charge of assault with a deadly weapon or simple assault, the trial court was not required to instruct the jury on those lesser included offenses. *Day v. United States*, App. D.C., 390 A.2d 957 (1978), rev'd on other grounds sub nom. *Graves v. United States*, App. D.C., 490 A.2d 1086 (1984).

Second degree murder instruction unnecessary unless evidence warrants. — Where all the testimony points to first degree murder only, the giving of a second degree

murder instruction is error. *Green v. United States*, 218 F.2d 856 (D.C. Cir. 1955).

The court must charge that if the jury believes the defendant guilty of killing, but if any reasonable doubt exists as to whether he committed first degree murder or second degree murder, it should be resolved in favor of the lesser crime, only where, from the evidence as a whole, the jury might reasonably find the defendant guilty in either degree and must decide which degree. *Goodall v. United States*, 180 F.2d 397 (D.C. Cir.), cert. denied, 339 U.S. 987, 70 S. Ct. 1009, 94 L. Ed. 1389 (1950).

In felony murder prosecution, failure to instruct jury as to lesser included offense of second degree murder was not error where to give such an instruction would have required a “bizarre reconstruction” of the evidence. *Wood v. United States*, App. D.C., 472 A.2d 408 (1984).

Proper instruction on second degree murder as lesser included offense. — If the defendant insists that a charge of second degree murder be submitted to the jury solely as a lesser offense included within a first degree murder charge, and if he makes a timely motion or objection, he is entitled to an instruction directing the jury: (1) To first consider the issue of guilt as to first degree murder; (2) in the event of acquittal, to consider guilt of second degree murder; and (3) in the event of a guilty verdict of first degree murder, to enter no verdict concerning second degree murder. *United States v. Butler*, 455 F.2d 1338 (D.C. Cir. 1971).

Proper instruction in prosecution resulting in second degree murder conviction. — In a prosecution for murder resulting in a conviction of a second degree murder, a charge covering premeditation, malice, and self-defense is not erroneous. *Thomas v. United States*, 158 F.2d 97 (D.C. Cir. 1946), cert. denied, 331 U.S. 822, 67 S. Ct. 1303, 91 L. Ed. 1838 (1947).

Instruction on prior assault charge. — Evidence of murder and attempted murder occurring one week after incident leading to simple assault charge, if admitted at a trial of the simple assault, would have created an extreme risk of prejudice no matter what instructions the judge gave regarding the limited use of the evidence. Thus, the charges should have been severed. *Parks v. United States*, App. D.C., 656 A.2d 1137, cert. denied, — U.S. —, 116 S. Ct. 198, 133 L. Ed. 2d 133 (1995).

Denial of instruction on lesser included offense. — In an action for felony murder, kidnapping and robbery, the trial court did not err in declining to grant a jury instruction on the lesser included offense of robbery where there was no sufficient evidentiary basis for the lesser included charge. *Catlett v. United States*, App. D.C., 545 A.2d 1202 (1988), cert. denied,

488 U.S. 1017, 109 S. Ct. 814, 102 L. Ed. 2d 803 (1989).

But error in submitting charge not prejudicial where manslaughter verdict not returned. — Any error in submitting a lesser included offense of manslaughter in a charge of first degree murder is not prejudicial where a verdict of manslaughter is not returned. *Hansborough v. United States*, 308 F.2d 645 (D.C. Cir. 1962).

Provocation insufficient to support manslaughter instruction. — Passion aroused by a rape is insufficient provocation to justify a manslaughter instruction where a shooting of the alleged rapist takes place over an hour after hearing of the rape. *Dean v. United States*, App. D.C., 377 A.2d 423 (1977).

Defective self-defense instruction. — A requested instruction on self-defense which fails to state what the defendant was in imminent danger of is defective. *Jackson v. United States*, 48 App. D.C. 272 (1919).

Failure to volunteer instruction not error where no evidence nor request. — The failure to volunteer an instruction on the question of the voluntariness of a confession is not an error where there is not sufficient evidence to warrant such an instruction and note is requested. *Hawkins v. United States*, 158 F.2d 652 (D.C. Cir. 1946), cert. denied, 331 U.S. 830, 67 S. Ct. 1347, 91 L. Ed. 1844 (1947).

But defendant cannot complain of favorable instruction given at request of his counsel. *Mumforde v. United States*, 130 F.2d 411 (D.C. Cir.), cert. denied, 317 U.S. 656, 63 S. Ct. 53, 87 L. Ed. 527 (1942).

F. Verdict.

Plea bargaining. — One charged with first degree murder and conspiracy to commit murder may reach an agreement to enter a plea of guilty to second degree murder, in exchange for testifying in grand jury proceedings and the pending trial of the alleged actual murderer, and the judge must justify a departure from the course agreed upon by the prosecution and the defense. *United States v. Ammidown*, 497 F.2d 615 (D.C. Cir. 1973).

Evidence to be considered separately for each of several multiple defendants. — In a prosecution of multiple defendants for homicide, the evidence must be considered separately as to each defendant. *Turberville v. United States*, 303 F.2d 411 (D.C. Cir.), cert. denied, 370 U.S. 946, 82 S. Ct. 1607, 8 L. Ed. 2d 813 (1962).

And deadlock-dissolving charge not error following verdict against 1 defendant. — In a prosecution for first degree premeditated murder, the court does not err in giving a deadlock-dissolving charge to the jury one-half day after it returns its verdict against one of

the defendants. *Blango v. United States*, App. D.C., 373 A.2d 885 (1977).

Dual convictions for murder arising out of a single killing are permissible, although consecutive sentences are not. *United States v. Ammidown*, 497 F.2d 615 (D.C. Cir. 1973).

The fact that a defendant committing a single homicide cannot be given consecutive sentences for both first degree murder and another crime of homicide does not mean that multiple convictions are impermissible. *McFadden v. United States*, App. D.C., 395 A.2d 14 (1978).

Inconsistent jury verdicts permissible. — Where jury acquitted defendant of carrying a pistol without a license, it did not necessarily find him not guilty as a principal in the first degree (shooting) murder since inconsistent jury verdicts are permissible. *Miller v. United States*, App. D.C., 479 A.2d 862 (1984).

Where 1 killing is involved, and government advances alternate theories of felony murder based upon more than 1 underlying felony, the accused may not be convicted of more than 1 felony murder. *Garris v. United States*, App. D.C., 465 A.2d 817 (1983), cert. denied, 465 U.S. 1012, 104 S. Ct. 1013, 79 L. Ed. 2d 243 (1984).

Evidence supportive of guilty verdict. — Evidence of an eyewitness which is corroborated by physical details may support a guilty verdict of first degree murder. *Brown v. United States*, 375 F.2d 310 (D.C. Cir. 1966), cert. denied, 388 U.S. 915, 87 S. Ct. 2133, 18 L. Ed. 2d 1359 (1967).

Testimony as to incriminating statements may sustain a conviction for murder. *Calloway v. United States*, 399 F.2d 1006 (D.C. Cir.), cert. denied, 393 U.S. 987, 89 S. Ct. 464, 21 L. Ed. 2d 448 (1968).

The testimony of an eyewitness is sufficient to support a conviction of murder. *United States v. Heinlein*, 490 F.2d 725 (D.C. Cir. 1973).

Circumstantial evidence can support a conviction for murder. *Calhoun v. United States*, App. D.C., 369 A.2d 605 (1977).

Evidence sufficient to sustain conviction. — See *Byrd v. United States*, App. D.C., 388 A.2d 1225 (1978); *Christian v. United States*, App. D.C., 394 A.2d 1 (1978), cert. denied, 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315 (1979); *Hairston v. United States*, App. D.C., 497 A.2d 1097 (1985).

Lesser included offenses. — Given the factual determination necessarily underlying the jury's verdict of first degree murder and its consequent eschewal of the lesser included offense of second degree murder on which it was instructed, the jury could not rationally have acquitted on both offenses and found defendant guilty of the even lesser included offense of voluntary manslaughter if properly instructed.

Swann v. United States, App. D.C., 648 A.2d 928 (1994).

G. Sentence.

Consecutive sentences for single killing improper. — An imposition of multiple consecutive sentences for multiple convictions of murder in the first degree is improper where the convictions arise from the same killing. *United States v. Lee*, 513 F.2d 423 (D.C. Cir.), cert. denied, 423 U.S. 916, 96 S. Ct. 225, 46 L. Ed. 2d 146 (1975).

Where there is 1 death, and jury returns verdict of guilty as to felony murder and underlying felony as well, then the court may impose sentence on only 1 of those charges, but not both. *Garris v. United States*, App. D.C., 465 A.2d 817 (1983), cert. denied, 465 U.S. 1012, 104 S. Ct. 1013, 79 L. Ed. 2d 243 (1984); *Adams v. United States*, App. D.C., 502 A.2d 1011 (1986).

Consecutive sentences cannot be imposed for felony murder and the underlying felony. *Adams v. United States*, App. D.C., 502 A.2d 1011 (1986).

Also improper where felony murder and underlying felony merge. — Where a charge of felony murder includes every essential fact element of the underlying felony charge, there is a merger and consecutive sentences are improper. *United States v. Greene*, 489 F.2d 1145 (D.C. Cir. 1973), cert. denied, 419 U.S. 977, 95 S. Ct. 239, 42 L. Ed. 2d 190 (1974).

Congress did not authorize consecutive sentences for rape and for a killing committed in the course of the rape. *Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980).

Burglary, premeditated murder and robbery convictions did not merge as "one continuous criminal act." *Bennett v. United States*, App. D.C., 620 A.2d 1342 (1993).

No obstacle to concurrent sentences for single killing. — There is no legal obstacle to indicting, convicting, and imposing concurrent sentences for both felony murder and premeditated murder where the crimes arise from a single act. *United States v. Mack*, 466 F.2d 333 (D.C. Cir.), cert. denied, 409 U.S. 952, 93 S. Ct. 297, 34 L. Ed. 2d 223 (1972).

Concurrent sentences for armed robbery and felony murder held illegal. — Since a conviction for killing in the course of an armed robbery cannot be had without proving all the elements of the offense of armed robbery, imposition of concurrent sentences of 20 years to life on each separate count of felony murder and armed robbery is illegal as effectively resulting in multiple or cumulative punishment and must be vacated. *Tribble v. United States*, App. D.C., 447 A.2d 766 (1982).

Defendants cannot be sentenced, either consecutively or concurrently, for both felony murder and the underlying felony. *Catlett v. United States*, App. D.C., 545 A.2d 1202 (1988), cert. denied, 488 U.S. 1017, 109 S. Ct. 814, 102 L. Ed. 2d 803 (1989).

Robbery sentence not precluded by merger of offenses. — The fact that defendant's felony murder and underlying robbery convictions merged did not prevent the court from sentencing defendant on the robbery conviction, where the felony murder conviction had been vacated on the ground of double jeopardy. *Garris v. United States*, App. D.C., 491 A.2d 511 (1985).

H. Appeal.

Evidence reviewed in light most favorable to appellee. — When considering claims of evidentiary insufficiency, all the evidence, whether direct or circumstantial, is reviewed in a light most favorable to the appellee. The conviction will be sustained if the evidence reasonably permits a finding of guilt beyond a reasonable doubt. *Dobson v. United States*, App. D.C., 426 A.2d 361 (1981).

Failure to disclose witnesses' convictions not grounds for new trial. — Government's failure to disclose prior convictions and juvenile adjudications of its witnesses did not entitle appellant to a new trial for his first degree murder conviction. *Tabron v. United States*, App. D.C., 444 A.2d 942 (1982), modified on other grounds, *Brooks v. United States*, App. D.C., 516 A.2d 913 (1986), modified on other grounds, *Johnson v. United States*, App. D.C., 537 A.2d 555 (1988).

New trial unwarranted absent evidence that recanting witness testified falsely. — A new trial for a murder charge is not warranted where the defendants offer no credible or admissible evidence from which the court can be reasonably satisfied that a recanting key witness' trial testimony was false. *United States v. Mackin*, 561 F.2d 958 (D.C. Cir.), cert. denied, 434 U.S. 959, 98 S. Ct. 490, 54 L. Ed. 2d 319 (1977).

Accused barred from objecting to separate trials brought about by own efforts. — Where separate trials on charges of murder and attempted robbery are the result of the accused's own efforts, he cannot raise double jeopardy, res judicata, or collateral estoppel as a bar to a murder trial following the robbery trial. In re A.L.S., App. D.C., 377 A.2d 1149 (1977).

Reindictment for first degree murder following mistrial for second degree murder unconstitutional, absent justification. — A reindictment for first degree murder following a mistrial for second degree murder is a denial of due process, absent any showing of

justification for the increase in the degree of the crime charged. *United States v. Jamison*, 505 F.2d 407 (D.C. Cir. 1974).

Government estopped from using evidence from first trial. — Where in the first trial the jury acquitted defendant of use of an automobile without the owner's consent, armed robbery and assault with a dangerous weapon, the government was collaterally estopped from

having the evidence supporting those counts admitted against the defendant in a second trial charging him with making 4 sawed-off shotguns, first degree murder while armed, second degree murder while armed, unlawful possession of 5 sawed-off shotguns and being an accessory after the fact to first degree and second degree murder. *United States v. Day*, 591 F.2d 861 (D.C. Cir. 1978).

§ 22-2402. Same — Placing obstructions upon or displacement of railroads.

Whoever maliciously places an obstruction upon a railroad or street railroad, or displaces or injures anything appertaining thereto, or does any other act with intent to endanger the passage of any locomotive or car, and thereby occasions the death of another, is guilty of murder in the first degree. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 799; 1973 Ed., § 22-2402.)

Cross references. — As to punishment for first- and second degree murder, see § 22-2404.

Section references. — This section is referred to in §§ 11-502, 22-2403, and 24-482.

Jury may be instructed on second degree murder as a lesser included offense where the indictment is solely for felony murder. *Fuller v. United States*, 407 F.2d 1199 (D.C. Cir. 1967), cert. denied, 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125 (1969).

Cited in *United States v. Jackson*, App. D.C., 528 A.2d 1211 (1987); *Comber v. United States*, App. D.C., 584 A.2d 26 (1990); *Johnson v. United States*, App. D.C., 596 A.2d 980 (1991), cert. denied, 504 U.S. 927, 112 S. Ct. 1987, 118 L. Ed. 2d 585 (1992); *Poole v. Kelly*, 954 F.2d 760 (D.C. Cir. 1992); *Matthews v. United States*, App. D.C., 629 A.2d 1185 (1993).

§ 22-2403. Murder in the second degree.

Whoever with malice aforethought, except as provided in §§ 22-2401, 22-2402, kills another, is guilty of murder in the second degree. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 800; June 12, 1940, 54 Stat. 347, ch. 339; 1973 Ed., § 22-2403.)

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I.

I. GENERAL CONSIDERATION.

A. In General.

Cross references. — As to punishment for first and second degree murder, see § 22-2404.

Section references. — This section is referred to in §§ 11-502, 23-546 and 24-482.

Second degree murder is an included offense under an indictment for felony murder. *Jackson v. United States*, 313 F.2d 572 (D.C. Cir. 1962); *Price v. United States*, App. D.C., 531 A.2d 984 (1987).

Second degree murder may be lesser included offense of first degree and/or felony murder. — In particular factual settings, second degree murder constitutes an appropriate lesser included offense of first degree premeditated murder and/or first degree felony murder. *Turner v. United States*, App. D.C., 459 A.2d 1054 (1983).

But jury considers second degree murder only where proof of felony murder defective. — A jury may consider the issue of second degree murder on an indictment of first degree felony murder only if it finds some defect with the proof of felony murder. *Fuller v. United States*, 407 F.2d 1199 (D.C. Cir. 1967), cert. denied, 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125 (1969).

Manslaughter is a lesser included offense of second degree murder. — There are 2 prerequisites to granting a lesser included offense instruction: (1) The lesser offense must consist of some, but not every element of the greater offense; and (2) the evidence must be sufficient to support the lesser charge. Manslaughter is a lesser included offense of second degree murder. *Price v. United States*, App. D.C., 602 A.2d 641 (1992).

Instruction on the lesser included offense of voluntary manslaughter was deficient where it failed to specify that voluntary manslaughter was limited to those homicides where the perpetrator's state of mind would constitute malice aforethought but for the presence of legally recognized mitigating circumstances. *Swanson v. United States*, App. D.C., 602 A.2d 1102 (1992).

Where there was an erroneous instruction on the lesser included offense of voluntary manslaughter, there was no prejudice to the defendant where he was convicted by the jury of the greater offense of second degree murder. *Swanson v. United States*, App. D.C., 602 A.2d 1102 (1992).

Where the jury could reach no conclusion that defendant acted out of fear on the evidence before it, the instruction on the lesser included offense of manslaughter was properly denied. *Price v. United States*, App. D.C., 602 A.2d 641 (1992).

A defendant will be entitled to a manslaughter

instruction if there is evidence of legally recognizable mitigating factors which reduce murder to manslaughter; however, the suddenness of the homicidal act is insufficient, standing alone, to negate malice. That a homicide is impulsive or unplanned will not reduce second degree murder to manslaughter. *Price v. United States*, App. D.C., 602 A.2d 641 (1992).

Conviction appropriate where proof of felony underlying felony murder fails. — In a trial for second degree murder as a lesser included offense of felony murder, the government may fail in proof of the underlying felony, yet the jury could still convict of second degree murder. *Turner v. United States*, App. D.C., 459 A.2d 1054 (1983).

And verdict appropriate for intentional, impulsive killing. — Where an indictment charges felony murder, a verdict of second degree murder is appropriate where there is proof from which the jury might reasonably find that the defendant did not commit the enumerated felony but intentionally killed on impulse. *Fuller v. United States*, 407 F.2d 1199 (D.C. Cir. 1967), cert. denied, 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125 (1969).

Conviction appropriate under indictment charging first degree murder where evidence warrants. — Although the indictment charges murder in the first degree, the defendant can be found guilty of second degree murder where the evidence warrants it. *Goodall v. United States*, 180 F.2d 397 (D.C. Cir.), cert. denied, 339 U.S. 987, 70 S. Ct. 1009, 94 L. Ed. 1389 (1950).

Double jeopardy. — Since victim had not died at the time defendant was prosecuted for assault with intent to kill, while armed, all the events necessary for prosecution of second degree murder had not occurred when the prosecution for assault with intent to kill commenced. Double jeopardy, therefore, would not bar a subsequent prosecution for second degree murder; since malice was not presented to the jury at the first trial, the government is collaterally estopped from proving that the defendant acted with malice. *United States v. Jackson*, App. D.C., 528 A.2d 1211 (1987).

Cited in *Jordon v. United States*, 87 F.2d 64 (D.C. Cir. 1936), cert. denied, 303 U.S. 654, 58 S. Ct. 762, 82 L. Ed. 1114 (1938); *Griffin v. United States*, 164 F.2d 903 (D.C. Cir. 1947), cert. denied, 333 U.S. 857, 68 S. Ct. 727, 92 L. Ed. 1137 (1948); *Ross v. United States*, 267 F.2d 618 (D.C. Cir.), cert. denied, 360 U.S. 939, 79 S. Ct. 1464, 3 L. Ed. 2d 1551 (1959); *Williams v. United States*, 267 F.2d 625 (D.C. Cir.), cert. denied, 360 U.S. 939, 79 S. Ct. 1464, 3 L. Ed. 2d 1551 (1959); *Falls v. United States*, 321 F.2d 762 (D.C. Cir. 1963); *Lewis v. United States*, 381 F.2d 894 (D.C. Cir. 1967); *Jackson v. United States*, 439 F.2d 529 (D.C. Cir. 1970); *United States v. McClain*, 440 F.2d 241 (D.C. Cir.

- 1971); *United States v. Cobb*, 449 F.2d 1145 (D.C. Cir. 1971); *United States v. Honesty*, 459 F.2d 1279 (D.C. Cir. 1971); *United States v. Ransom*, 465 F.2d 672 (D.C. Cir. 1972); *United States v. Kyle*, 469 F.2d 547 (D.C. Cir. 1972), cert. denied, 409 U.S. 1117, 93 S. Ct. 920, 34 L. Ed. 2d 700 (1973); *United States v. Pickett*, 470 F.2d 1255 (D.C. Cir. 1972); *United States v. Grady*, 481 F.2d 1106 (D.C. Cir. 1973); *United States v. Patrick*, 494 F.2d 1150 (D.C. Cir. 1974); *United States v. Lynch*, 499 F.2d 1011 (D.C. Cir. 1974); *Hazel v. United States*, App. D.C., 319 A.2d 136 (1974); *United States v. Robertson*, 529 F.2d 879 (D.C. Cir. 1976); *Steadman v. United States*, App. D.C., 358 A.2d 329 (1976); *Brown v. United States*, App. D.C., 359 A.2d 600 (1976); *Carmichael v. United States*, App. D.C., 363 A.2d 302 (1976); *Bethea v. United States*, App. D.C., 365 A.2d 64 (1976), cert. denied, 433 U.S. 911, 97 S. Ct. 2979, 53 L. Ed. 2d 1095 (1977); *United States v. Robertson*, 430 F. Supp. 444 (D.D.C. 1977); *Brown v. United States*, App. D.C., 372 A.2d 557, cert. denied, 434 U.S. 921, 98 S. Ct. 397, 54 L. Ed. 2d 278 (1977); *United States v. Clark*, App. D.C., 376 A.2d 434 (1977); *Young v. United States*, App. D.C., 391 A.2d 248 (1978); *Campbell v. United States*, App. D.C., 391 A.2d 283 (1978); *Gaither v. United States*, App. D.C., 391 A.2d 1364 (1978); *Peoples v. United States*, App. D.C., 395 A.2d 41 (1978), cert. denied, 442 U.S. 911, 99 S. Ct. 2826, 61 L. Ed. 2d 277 (1979); *Ellis v. United States*, App. D.C., 395 A.2d 404 (1978), cert. denied, 442 U.S. 913, 99 S. Ct. 2830, 61 L. Ed. 2d 280 (1979); *Braxton v. United States*, App. D.C., 395 A.2d 759 (1978); *Jones v. United States*, App. D.C., 398 A.2d 11 (1979); *O'Connor v. United States*, App. D.C., 399 A.2d 21 (1979); *Gillis v. United States*, App. D.C., 400 A.2d 311 (1979); *Sellers v. United States*, App. D.C., 401 A.2d 974 (1979); *Letsinger v. United States*, App. D.C., 402 A.2d 411 (1979); *Jackson v. United States*, App. D.C., 404 A.2d 911 (1979); *Ibn-Tamas v. United States*, App. D.C., 407 A.2d 626 (1979); *Baylor v. United States*, App. D.C., 407 A.2d 664 (1979); *Khaalis v. United States*, App. D.C., 408 A.2d 313 (1979), cert. denied, 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781 (1980); *Calaway v. United States*, App. D.C., 408 A.2d 1220 (1979); *Smith v. United States*, App. D.C., 414 A.2d 1189 (1980); *United States v. McKoy*, 645 F.2d 1037 (D.C. Cir. 1981); *Dobson v. United States*, App. D.C., 426 A.2d 361 (1981); *Johnson v. United States*, App. D.C., 434 A.2d 415 (1981); *Hill v. United States*, App. D.C., 434 A.2d 422 (1981); *United States v. Frady*, 456 U.S. 152, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982); *United States v. Kearney*, 682 F.2d 214 (D.C. Cir. 1982); *Harris v. United States*, App. D.C., 441 A.2d 268 (1982); *Jones v. United States*, App. D.C., 441 A.2d 1004 (1982); *Green v. United States*, App. D.C., 446 A.2d 402 (1982); *United States v. Donaldson*, App. D.C., 451 A.2d 51 (1982), cert. denied, 464 U.S. 838, 104 S. Ct. 128, 78 L. Ed. 2d 124 (1983); *McKeamer v. United States*, App. D.C., 452 A.2d 348 (1982); *Hawkins v. United States*, App. D.C., 461 A.2d 1025 (1983), cert. denied, 464 U.S. 1052, 104 S. Ct. 734, 79 L. Ed. 2d 193 (1984); *Shelvy v. Whitfield*, 718 F.2d 441 (D.C. Cir. 1983); *Smith v. United States*, App. D.C., 470 A.2d 315 (1983), cert. denied, 469 U.S. 1218, 105 S. Ct. 1201, 84 L. Ed. 2d 344 (1985); *Bruce v. United States*, App. D.C., 471 A.2d 1005 (1984); *McClurkin v. United States*, App. D.C., 472 A.2d 1348, cert. denied, 469 U.S. 838, 105 S. Ct. 136, 83 L. Ed. 2d 76 (1984); *United States v. McRae*, 580 F. Supp. 1560 (D.D.C. 1984); *Rogers v. United States*, App. D.C., 483 A.2d 277 (1984), cert. denied, 469 U.S. 1227, 105 S. Ct. 1223, 84 L. Ed. 2d 362 (1985); *Hammill v. United States*, App. D.C., 498 A.2d 551 (1985); *Hairston v. United States*, App. D.C., 500 A.2d 994 (1985); *Stack v. United States*, App. D.C., 519 A.2d 147 (1986); *Ruffin v. United States*, App. D.C., 524 A.2d 685 (1987), cert. denied, 486 U.S. 1057, 108 S. Ct. 2827, 100 L. Ed. 2d 927 (1988); *Kerns v. United States*, App. D.C., 551 A.2d 1336 (1989); *Smith v. United States*, App. D.C., 554 A.2d 1155 (1989); *Martinez v. United States*, App. D.C., 566 A.2d 1049 (1989), cert. denied, 498 U.S. 1030, 111 S. Ct. 685, 112 L. Ed. 2d 677 (1991); *Tucker v. United States*, App. D.C., 569 A.2d 162 (1990); *David v. United States*, App. D.C., 579 A.2d 1172 (1990); *United States v. Jones*, 118 WLR 1837 (Super. Ct. 1990); *Belton v. United States*, App. D.C., 581 A.2d 1205 (1990); *Wilkins v. United States*, App. D.C., 582 A.2d 939 (1990); *Doe v. United States*, App. D.C., 583 A.2d 670 (1990); *Comber v. United States*, App. D.C., 584 A.2d 26 (1990); *Goodall v. United States*, App. D.C., 584 A.2d 560 (1990); *Reed v. United States*, App. D.C., 584 A.2d 585 (1990); *Coreas v. United States*, App. D.C., 585 A.2d 1376, cert. denied, 502 U.S. 855, 112 S. Ct. 167, 116 L. Ed. 2d 130 (1991); *Clark v. United States*, App. D.C., 593 A.2d 186 (1991); *United States v. Hobbs*, 119 WLR 673 (Super. Ct. 1991); *Martin v. United States*, App. D.C., 606 A.2d 120 (1991); *Yelverton v. United States*, App. D.C., 606 A.2d 181 (1992); *Burgess v. United States*, App. D.C., 608 A.2d 733 (1992); *Johnson v. United States*, App. D.C., 609 A.2d 1112 (1992); *Settles v. United States*, App. D.C., 615 A.2d 1105 (1992); *Johnson v. United States*, App. D.C., 616 A.2d 1216 (1992), cert. denied, 507 U.S. 996, 113 S. Ct. 1611, 123 L. Ed. 2d 172 (1993); *Curington v. United States*, App. D.C., 621 A.2d 819 (1993); *Morris v. United States*, App. D.C., 622 A.2d 1116, cert. denied, — U.S. —, 114 S. Ct. 270, 126 L. Ed. 2d 221 (1993); *Robinson v. United States*, App. D.C., 623 A.2d 1234 (1993); *Edelen v. United States*, App. D.C., 627 A.2d 968 (1993); *Cowan v. United States*, App. D.C., 629 A.2d 496 (1993); *Matos v. United*

States, App. D.C., 631 A.2d 28 (1993); *Collins v. United States*, App. D.C., 631 A.2d 48 (1993); *Johnson v. United States*, App. D.C., 631 A.2d 871 (1993); *Wilkes v. United States*, App. D.C., 631 A.2d 880 (1993), cert. denied, — U.S. —, 115 S. Ct. 143, 130 L. Ed. 2d 84 (1994); *Freeland v. United States*, App. D.C., 631 A.2d 1186 (1993); *Simpson v. United States*, App. D.C., 632 A.2d 374 (1993); *Henderson v. United States*, App. D.C., 632 A.2d 419 (1993); *Tursio v. United States*, App. D.C., 634 A.2d 1205 (1993); *Young v. United States*, App. D.C., 639 A.2d 92 (1994); *Carey v. United States*, App. D.C., 647 A.2d 56 (1994); *White v. United States*, App. D.C., 647 A.2d 766 (1994); *Martin v. United States*, App. D.C., 647 A.2d 1135 (1994); *Jackson v. United States*, App. D.C., 650 A.2d 659 (1994).

B. Other Offenses Distinguished.

Distinction between first degree and second degree murder. — Second degree murder differs from first degree murder in that it may be committed either without purpose or intent to kill, or without premeditation and deliberation. *Tucker v. United States*, 318 F.2d 221 (D.C. Cir. 1963), cert. denied, 381 U.S. 952, 85 S. Ct. 1812, 14 L. Ed. 2d 726 (1965).

Intentional murder is in the first degree if committed in cold blood and is in the second degree if committed on impulse or in the sudden heat of passion. *Austin v. United States*, 382 F.2d 129 (D.C. Cir. 1967), overruled on other grounds, *United States v. Foster*, 783 F.2d 1082 (D.C. Cir. 1986).

First degree murder requires premeditation and deliberation and may be a calculated and planned killing while homicides that are unplanned or impulsive, even though they are intentional and with malice aforethought, are murders in the second degree. *Austin v. United States*, 382 F.2d 129 (D.C. Cir. 1967), overruled on other grounds, *United States v. Foster*, 783 F.2d 1082 (D.C. Cir. 1986).

All homicides with malice are murder in the second degree, except those particularly heinous murders listed in § 22-2401. *Fuller v. United States*, 407 F.2d 1199 (D.C. Cir. 1967), cert. denied, 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125 (1969).

Murder in the first degree is an intentional homicide done deliberately and with premeditation, while a homicide that is intentional but "impulsive," not done after "reflection and meditation", is murder in the second degree. *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

First degree murder includes the elements of premeditation and deliberation while second degree murder does not. *Butler v. United States*, App. D.C., 322 A.2d 279 (1974).

First degree murder requires premeditation. — A homicide conceived in passion constitutes murder in the first degree only if there is an appreciable time after the design is conceived plus further thought and a turning over in the mind. *Austin v. United States*, 382 F.2d 129 (D.C. Cir. 1967), overruled on other grounds, *United States v. Foster*, 783 F.2d 1082 (D.C. Cir. 1986).

Otherwise, killing second degree murder. — An intentional killing may be a second degree murder if premeditation and deliberation do not exist. *Tucker v. United States*, 318 F.2d 221 (D.C. Cir. 1963), cert. denied, 381 U.S. 952, 85 S. Ct. 1812, 14 L. Ed. 2d 726 (1965).

To reduce murder to manslaughter, not only is a showing of "heat of passion" required, but that passion must arise from sufficient provocation, that is, what would cause an ordinarily reasonable person to lose his or her self-control and act without reflection. *Price v. United States*, App. D.C., 602 A.2d 641 (1992).

Reducing murder to manslaughter. — The subjective frame of mind that is required for imperfect self-defense is identical to that present in true self-defense, and that frame of mind, sufficient to result in an acquittal if objectively reasonable, should be sufficient to meet the mitigation standard required to reduce second degree murder to voluntary manslaughter. *Swann v. United States*, App. D.C., 648 A.2d 928 (1994).

Distinction between second degree murder and manslaughter. — Where there is malice aforethought in regard to a homicide, the crime is second degree murder, but if malice aforethought is lacking, the crime is manslaughter. *United States v. Hamilton*, 182 F. Supp. 548 (D.D.C. 1960).

The essential distinction between murder and manslaughter is the presence or absence of malice. *Logan v. United States*, 411 F.2d 679 (D.C. Cir. 1968).

If malice is proved beyond a reasonable doubt and no affirmative defense applies, the killing is murder; if malice is not proved, the killing is manslaughter. *United States v. Alexander*, 471 F.2d 923 (D.C. Cir.), cert. denied, 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494 (1972).

There is a difference in the nature of recklessness required for second degree murder and that required for manslaughter. *United States v. Hinkle*, 487 F.2d 1205 (D.C. Cir. 1973), aff'd, 492 F.2d 660 (D.C. Cir. 1974).

The difference between that recklessness which displays such a depravity and such an extreme and wanton disregard for human life as to constitute malice and that recklessness which amounts only to manslaughter lies in the quality of awareness of the risk. *United States v. Dixon*, 419 F.2d 288 (D.C. Cir. 1969).

"Manslaughter" defined. — "Manslaughter" occurs where homicide is committed at a

time of mutual combat or where it is committed in passion or hot blood caused by adequate provocation. *United States v. Hardin*, 443 F.2d 735 (D.C. Cir. 1970).

Voluntary manslaughter is the unlawful or unexcused killing of a human being without malice. *West v. United States*, App. D.C., 499 A.2d 860 (1985).

Voluntary manslaughter is lesser included offense within second degree murder. *Branch v. United States*, App. D.C., 492 A.2d 1033 (1978).

Involuntary manslaughter as lesser included offense of second degree murder. — See *Fornah v. United States*, App. D.C., 460 A.2d 556 (1983).

II. ELEMENTS.

A. In General.

"Murder in the second degree" defined. — "Murder in the second degree" may be defined as the unlawful killing of another without a premeditated design and plan to effect death, but with malice aforethought. *Fryer v. United States*, 207 F.2d 134 (D.C. Cir.), cert. denied, 346 U.S. 885, 74 S. Ct. 135, 98 L. Ed. 389 (1953).

With certain statutory exceptions, where there is an unjustified and unpremeditated intentional killing done with malice, the offense is murder in the second degree. *Hansborough v. United States*, 308 F.2d 645 (D.C. Cir. 1962).

The essential elements of the offense of murder in the second degree are: (1) That the defendant inflicted an injury or injuries upon the deceased from which the deceased died; (2) that the defendant, at the time he so injured the deceased, acted with malice; and (3) that the defendant did not injure the deceased in the heat of passion caused by adequate provocation. *United States v. McClurkin*, 110 WLR 1657 (Super. Ct.); *Turner v. United States*, App. D.C., 459 A.2d 1054 (1983).

And includes accidental killings. — If the defendant did not have a purpose to kill or if the killing was accidental, he is guilty of murder in the second degree. *Marcus v. United States*, 86 F.2d 854 (D.C. Cir. 1936).

As well as "passionate" killings. — A killing under the influence of a passion induced by insufficient provocation may be murder in the second degree, as may an accidental or unintentional killing where accompanied by malice. *United States v. Edmonds*, 63 F. Supp. 968 (D.D.C. 1946).

Second degree murder is done by wilful and malicious actions. *Logan v. United States*, 411 F.2d 679 (D.C. Cir. 1968).

There is a causation and malice requirement for second degree murder. *United States v. Lucas*, 447 F.2d 338 (D.C. Cir. 1971).

But not necessarily without intent. — Second degree murder is killing with malice aforethought but not necessarily without intent to kill. *Kitchen v. United States*, 205 F.2d 720 (D.C. Cir. 1953).

And premeditation unnecessary. — An intentional killing that is not premeditated nor connected with another crime is murder in the second degree. *Kitchen v. United States*, 205 F.2d 720 (D.C. Cir. 1953).

B. Malice.

"Malice" defined. — "Malice" is state of mind showing a heart that is without regard for the life and safety of others. *United States v. Hinkle*, 487 F.2d 1205 (D.C. Cir. 1973), aff'd, 492 F.2d 660 (D.C. Cir. 1974).

"Malice" may be defined as a condition of the mind that prompts a person to do a wrongful act wilfully, that is, on purpose, to the injury of another, or to intentionally do a wrongful act toward another without justification or excuse. *Carter v. United States*, 437 F.2d 692 (D.C. Cir. 1970), cert. denied, 402 U.S. 912, 91 S. Ct. 1393, 28 L. Ed. 2d 655 (1971).

"Malice" is not a state of mind showing a heart regardless of social duty, a mind deliberately bent on mischief, or a generally depraved, wicked and malicious spirit. *United States v. Hinkle*, 487 F.2d 1205 (D.C. Cir. 1973), aff'd, 492 F.2d 660 (D.C. Cir. 1974).

Malice aforethought is merely a technical phrase that denotes 4 types of murder, each accompanied by distinct mental states: specific intent to kill, intent to cause serious bodily harm, acting with a wanton and wilful disregard of an unreasonable human risk (i.e., depraved heart murder), or killing during the intentional commission of a felony. *Swanson v. United States*, App. D.C., 602 A.2d 1102 (1992).

Malice may be established by either of 2 standards: (1) A subjective standard, i.e., did the defendant actually intend or foresee that death or serious bodily harm would result from his act; and (2) an objective, "reasonable man" standard, i.e., should the defendant have foreseen that such a result was likely. *Belton v. United States*, 382 F.2d 150 (D.C. Cir. 1967).

Malice under subjective standard. — Malice exists where the defendant had an awareness of serious danger to life and displayed a wanton disregard for human life. *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972), superseded on other grounds, *Shannon v. United States*, — U.S. —, 114 S.Ct. 2419, 129 L.Ed. 2d 459 (1994).

Malice under objective standard. — The malice necessary to support a second degree murder conviction may be implied from wanton reckless conduct. *Mitchell v. United States*, 434 F.2d 483 (D.C. Cir.), cert. denied, 400 U.S. 867, 91 S. Ct. 109, 27 L. Ed. 2d 106 (1970).

Malice may be implied from conduct which is so reckless or wanton as to manifest a depravity of mind and disregard of human life. *Mitchell v. United States*, 434 F.2d 483 (D.C. Cir.), cert. denied, 400 U.S. 867, 91 S. Ct. 109, 27 L. Ed. 2d 106 (1970); *United States v. Lucas*, 447 F.2d 338 (D.C. Cir. 1971).

Malice can be inferred from excessive recklessness. *United States v. Lucas*, 447 F.2d 338 (D.C. Cir. 1971).

Malice may be found where the conduct is reckless and wanton and a gross deviation from a reasonable standard of care, of such a nature that it may be inferred that the defendant was aware of a serious risk of death or serious bodily harm. *United States v. Cox*, 509 F.2d 390 (D.C. Cir. 1974).

Malice may be proven by a showing of (1) specific intent to kill; (2) a specific intent to inflict serious bodily harm; or (3) a wanton disregard of the unreasonable risk of death or serious bodily harm. Malice may also be implied where the homicide occurs during the commission of a felony. *Price v. United States*, App. D.C., 602 A.2d 641 (1992).

Denial of right to disprove reversible error. — Where trial court denied defendant the right to present evidence that was directly relevant to the existence of the element of malice for the most serious crimes with which he and an accomplice were charged, it was a constitutional error requiring reversal of murder conviction. *Howard v. United States*, App. D.C., 656 A.2d 1106 (1995).

Malice distinguished from specific intent to kill. — Element of malice, the state of mind required for an act of murder, cannot be equated with specific intent to kill: Intent may be, and often is, an ingredient of malice, but never its exact counterpart. *Logan v. United States*, App. D.C., 483 A.2d 664 (1984).

Even accidental or unintentional killing will constitute second degree murder if accompanied by malice. *Logan v. United States*, 411 F.2d 679 (D.C. Cir. 1968).

Malice may be inferred from the use of a dangerous weapon such as a gun. *Curry v. United States*, App. D.C., 322 A.2d 268 (1974).

Unless explanatory or mitigating circumstances. — If a person uses a deadly weapon in killing another, malice may be inferred in the absence of explanatory or mitigating circumstances. *United States v. Hardin*, 443 F.2d 735 (D.C. Cir. 1970).

But the law does not infer or presume malice from the use of a deadly weapon. *Green v. United States*, 405 F.2d 1368 (D.C. Cir. 1968), cert. denied, 400 U.S. 997, 91 S. Ct. 473, 27 L. Ed. 2d 447 (1971); *United States v. Green*, 424 F.2d 912 (D.C. Cir. 1970), cert. denied, 400 U.S. 997, 91 S. Ct. 473, 27 L. Ed. 2d 447 (1971).

Wrongful act intentionally done is not necessarily done with malice. *Green v.*

United States, 405 F.2d 1368 (D.C. Cir. 1968), cert. denied, 400 U.S. 997, 91 S. Ct. 473, 27 L. Ed. 2d 447 (1971).

A wrongful act intentionally done is not necessarily done with malice aforethought. *United States v. Perkins*, 498 F.2d 1054 (D.C. Cir. 1974).

Neither is act without probable consequences of death or great harm. — The commission of an act, the natural and probable consequences of which are less than death or great bodily harm, does not imply malice. *Logan v. United States*, 411 F.2d 679 (D.C. Cir. 1968).

State of mind is critical determination respecting existence of malice for second degree murder. *Rink v. United States*, App. D.C., 388 A.2d 52 (1978).

Defendant's expressions of hostility toward victim relevant to state of mind. — Testimony of witnesses concerning defendant's threats and other expressions of hostility toward the victim on prior occasions were relevant to determine her state of mind and admissible for that purpose. *Rink v. United States*, App. D.C., 388 A.2d 52 (1978).

Voluntary intoxication does not of itself negate malice. *Nestlerode v. United States*, 122 F.2d 56 (D.C. Cir. 1941).

Jury considers manslaughter where government fails to prove malice. — Where the government proves beyond a reasonable doubt that the defendant committed acts leading to the death of the victim but fails to prove malice, the jury may consider whether the defendant is guilty of manslaughter. *Logan v. United States*, 411 F.2d 679 (D.C. Cir. 1968).

Evidence sufficient to find malice. — Malice is found where a homicide directly results from the excessive speed of an automobile engaged in an offense punishable by imprisonment in the penitentiary. *Lee v. United States*, 112 F.2d 46 (D.C. Cir. 1940).

Evidence that the defendant intentionally fired a gun at the floor in a room where several persons were present is sufficient to support a finding of express or implied malice. *Mitchell v. United States*, 434 F.2d 483 (D.C. Cir.), cert. denied, 400 U.S. 867, 91 S. Ct. 109, 27 L. Ed. 2d 106 (1970).

Where the unrefuted evidence established that the decedent was shot fatally at close range after he retreated to his vehicle and attempted to escape, the circumstances prove malice. *Price v. United States*, App. D.C., 602 A.2d 641 (1992).

Evidence was sufficient to support defendant's conviction for second degree murder where the element of malice was supplied by the fact that defendant, a 27-year-old man, directly struck the victim, an eight-year-old girl who weighed approximately 50 pounds, hitting her eye with his fist, and by the fact that he

drowned her in a bathtub. *Byrd v. United States*, App. D.C., 618 A.2d 596 (1992).

Evidence insufficient to find malice. — Where a person kills another in a fit of ungovernable rage, there is no malice in the legal sense. *United States v. Hamilton*, 182 F. Supp. 548 (D.D.C. 1960).

III. PROCEDURE.

A. In General.

Removal of bullet from defendant's arm for introduction into evidence constitutional. — The Fourth Amendment rights of the defendant in a murder prosecution are not violated where the court, over the defendant's objection, orders the surgical removal of a bullet from his arm and allows its admission into evidence. *United States v. Crowder*, 543 F.2d 312 (D.C. Cir. 1976), cert. denied, 429 U.S. 1062, 97 S. Ct. 788, 50 L. Ed. 2d 779 (1977).

Failure to tender victim's criminal record found constitutional. — The failure to tender a second degree murder victim's criminal record to the defense does not deprive the defendant of a fair trial where the record is not requested, gives no rise to perjury, and the judge remains convinced of the defendant's guilt beyond a reasonable doubt after a first-hand appraisal of the entire record. *United States v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976).

Questioning of accused at scene of unexplained death is not a custodial interrogation. *United States v. Calhoun*, App. D.C., 363 A.2d 277 (1976).

Refusal to sever found proper. — The admission of a hearsay statement of a codefendant that he, the defendant and others were going to kill a prosecution witness does not so prejudicially affect the defendant as to justify a severance of his case. *Brabham v. United States*, App. D.C., 326 A.2d 254 (1974), cert. denied, 421 U.S. 989, 95 S. Ct. 1993, 44 L. Ed. 2d 479 (1975).

Given the interest in judicial efficiency, the trial court did not abuse its discretion in refusing to sever count of assault against one victim from charge of murdering a second victim. *Bowler v. United States*, App. D.C., 480 A.2d 678 (1984).

Refusal to sever found improper. — The refusal to grant a trial severance for several crimes, including first degree murder, arising out of separate robberies is prejudicial where there is the danger that the evidence with respect to the robberies will cumulate in the jurors' minds and tend to prove the defendant guilty of each. *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966).

Where separate murders occur some months apart, are distant in location and display no

motive, a joint trial is erroneous. *Tinsley v. United States*, App. D.C., 368 A.2d 531 (1976).

Voluntary delay in prosecution not prejudicial where defense unhampered. — An over-a-year-long delay in a second degree murder prosecution in which the accused initiates or consents to several continuances is not prejudicial where there is no indication that the delay hampered him in either preparing or establishing his defense. *United States v. Calhoun*, App. D.C., 363 A.2d 277 (1976).

Prosecutor's comments warranted reversal of conviction and retrial. — Prosecutor's misconduct in making egregious statements about defendant's failure to testify and his wife's failure to testify bore directly on and contaminated jury's deliberations on element of malice depriving defendant of fair trial on the charge of second degree murder; as such, conviction for second degree murder was reversed and remanded for retrial on charge of second degree murder charge or for entry of judgment of conviction for manslaughter and resentencing. *Bowler v. United States*, App. D.C., 480 A.2d 678 (1984).

B. Indictment.

Sufficient language in indictment for conviction. — The defendant can be convicted of second degree murder under a felony murder indictment where the indictment contains the language that he "unlawfully and feloniously did murder." *Jackson v. United States*, 313 F.2d 572 (D.C. Cir. 1962).

Variance in proof not fatal absent prejudice. — Where there is no suggestion that the defendant is in any way prejudiced by a mistake in his murder indictment and where he knows what the proof will be, the variance is not fatal. *United States v. Marshall*, 471 F.2d 1051 (D.C. Cir. 1972).

Charging second degree murder on charge of felony murder. — Second degree murder is a lesser included offense of felony murder; thus, even in absence of indictment charging second degree murder, it was proper for court, in an indictment accusing defendant of first degree felony murder, to instruct the jury to consider whether the evidence established murder in the second degree as the commission of the offense was 1 of the elements encompassed in the indictment. *Towles v. United States*, App. D.C., 521 A.2d 651, cert. denied, 483 U.S. 1008, 107 S. Ct. 3236, 97 L. Ed. 2d 741 (1987).

C. Defenses.

Requirement that prosecutor disclose before trial material evidence favorable to accused is satisfied when defendant is furnished a copy of exculpatory statement and the address and telephone number of the declarant.

The government need not obtain and maintain the availability of an exculpatory declarant as well. *Jackson v. United States*, App. D.C., 424 A.2d 40 (1980), cert. denied, 454 U.S. 1127, 102 S. Ct. 979, 71 L. Ed. 2d 116 (1981).

Provocation defense to second degree murder. — Provocation is not an element of manslaughter, whether voluntary or involuntary, but is a defense to second degree murder. *United States v. Alexander*, 471 F.2d 923 (D.C. Cir.), cert. denied, 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494 (1972).

The presence of adequate provocation, which mitigates malice, serves to reduce second degree murder to voluntary manslaughter, and thereby constitutes a defense to the former. *Bostick v. United States*, App. D.C., 605 A.2d 916 (1992).

Whose absence of government must prove. — Where the defense to second degree murder of adequate provocation is put in issue, the government must prove its absence beyond a reasonable doubt. *United States v. Alexander*, 471 F.2d 923 (D.C. Cir.), cert. denied, 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494 (1972).

In prosecution for assault with intent to murder while armed, it was important for the government to prove lack of provocation, even without regard to any claim of self-defense, for when the issue of provocation is in the case the government has the burden of proving, as an element of the crime, that there were no such circumstances mitigating a finding of malice. *Howard v. United States*, App. D.C., 656 A.2d 1106 (1995).

Government is generally not required to disprove provocation in its case in chief, unless its own evidence supports a finding of adequate provocation. *United States v. Alexander*, 471 F.2d 923 (D.C. Cir.), cert. denied, 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494 (1972).

Adequate provocation necessary before crime reduced to manslaughter. — If a killing is committed in a sudden heat of passion and caused by adequate provocation, the crime may be reduced from murder to manslaughter. *United States v. Edmonds*, 63 F. Supp. 968 (D.D.C. 1946).

An unlawful killing in the sudden heat of passion, whether produced by rage, resentment, anger, terror or fear is reduced from murder to manslaughter only if there is adequate provocation, such as might have naturally induced a reasonable man to lose some self-control and commit the act on impulse and without reflection. *Austin v. United States*, 382 F.2d 129 (D.C. Cir. 1967), overruled on other grounds, *United States v. Foster*, 783 F.2d 1082 (D.C. Cir. 1986).

Provocation must be adequate before the defendant may be acquitted of second degree murder and convicted instead of manslaughter.

United States v. Alexander, 471 F.2d 923 (D.C. Cir.), cert. denied, 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494 (1972).

Sudden discovery of adultery adequate provocation. — Legal provocation occurs where there is a sudden discovery of adulterous conduct causing such passion as to culminate in an immediate homicide. *Nicholson v. United States*, App. D.C., 368 A.2d 561 (1977).

Kicking another not adequate provocation. — Kicking another is not adequate enough provocation to reduce a fatal stabbing from murder to manslaughter. *United States v. Edmonds*, 63 F. Supp. 968 (D.D.C. 1946).

Defendant may make the contention that the fatal wound was inflicted in self-defense. *Parker v. United States*, 158 F.2d 185 (D.C. Cir. 1946), cert. denied, 330 U.S. 829, 67 S. Ct. 861, 91 L. Ed. 1278 (1947).

But self-defense is generally not available to one who provoked the difficulty. *United States v. Grover*, 485 F.2d 1039 (D.C. Cir. 1973).

Situation is a jury question. — Whether defendant forfeited his right to any imperfect self-defense claim, because he voluntarily placed himself in a position likely to provoke trouble, was a jury question. *Swann v. United States*, App. D.C., 648 A.2d 928 (1994).

And jury considers all circumstances in determining whether defendant aggressor. — To determine whether the defendant was the aggressor or whether he can establish a claim of self-defense to a charge of murder, the jury is required to consider all of the circumstances leading up to the fatal affray. *Harris v. United States*, 364 F.2d 701 (D.C. Cir. 1966).

Evidence of prior relationship between defendant and victim. — In a homicide trial where the accused raises a claim of self-defense, the government may properly introduce evidence of the prior relationship between the defendant and the victim to show who was the initial aggressor and whether the defendant was in reasonable fear of imminent great bodily harm. *Rawls v. United States*, App. D.C., 539 A.2d 1087 (1988).

Although instigator may claim self-defense if he attempted to disengage himself. — An instigator of an encounter that ultimately proves fatal may claim self-defense if, prior to the fatal blow, he attempted in good faith to disengage himself from the altercation and communicated his desire to do so to his opponent. *United States v. Grover*, 485 F.2d 1039 (D.C. Cir. 1973).

Degree of force allowed intervenor defending third person. — When the use of force in defense of a third person is justified, the intervenor is entitled to use the degree of force reasonably necessary to protect the other person on the basis of the facts as the intervenor, not the victim, reasonably perceives them.

Fersner v. United States, App. D.C., 482 A.2d 387 (1984).

Prosecution has the burden to disprove self-defense beyond a reasonable doubt. Myles v. United States, App. D.C., 364 A.2d 1195 (1976).

Deceased's character admissible on plea of self-defense. — On a plea of self-defense, evidence of the deceased's character and belligerency, though unknown to the defendant, is admissible. Evans v. United States, 277 F.2d 354 (D.C. Cir. 1960).

Evidence of the deceased's violent character, including evidence of specific violent acts, is admissible where a claim of self-defense is raised. United States v. Burks, 470 F.2d 432 (D.C. Cir. 1972).

As is defendant's prior behavior. — In a prosecution for second degree murder, the defendant's prior aggressive behavior toward the deceased during a prior altercation may imply that the defendant harbored malice toward the deceased or that the defendant was the aggressor in the subsequent fatal encounter. United States v. Grover, 485 F.2d 1039 (D.C. Cir. 1973).

Defendant's prior aggressive conduct towards deceased is relevant to self-defense claim because it is probative of: (1) The existence of malice towards the deceased; (2) whether the defendant was likely to be the aggressor in the encounter at issue; and (3) whether the defendant reasonably apprehended a danger of imminent serious bodily harm from the deceased; furthermore, evidence concerning prior instances of hostility, prior assaults and the like is particularly relevant in marital homicide cases. Rink v. United States, App. D.C., 388 A.2d 52 (1978).

Where a defendant raises a claim of self-defense, evidence of prior aggressive conduct is admissible. Fornah v. United States, App. D.C., 460 A.2d 556 (1983).

Once the defendant takes the stand and testifies in his own defense that the decedent had attacked him first, the evidence concerning his physical attack on decedent 10 months earlier has substantial probative value outweighing the prejudice of such evidence and hence the error in admitting this evidence was harmless. Fornah v. United States, App. D.C., 460 A.2d 556 (1983).

Defendant's state of mind. — Where a reasonable jury could have found that appellant had a subjective actual belief that his life was in danger and a like belief that he had to react with the force that he did, even though such beliefs were objectively unreasonable, the requested instruction on imperfect self-defense voluntary manslaughter should be given, and it was error not to do so. Swann v. United States, App. D.C., 648 A.2d 928 (1994).

Because the subjective state of mind required for an imperfect self-defense claim is identical

to that required for a true self-defense claim, there is no suggestion that an actual, albeit unreasonable, belief that one's life is in danger cannot serve as a mitigating factor justifying a voluntary manslaughter instruction when coupled with an actual belief that the force used was necessary in self-defense. Swann v. United States, App. D.C., 648 A.2d 928 (1994).

Defendant may claim insanity. — In a homicide prosecution, the defendant may claim he is not guilty by reason of insanity. Rose v. United States, 283 F.2d 376 (D.C. Cir. 1960), cert. denied, 365 U.S. 834, 81 S. Ct. 747, 5 L. Ed. 2d 744 (1961).

But adoption of diminished capacity concepts province of legislature. — Scope and magnitude of concepts of diminished capacity or partial insanity are such that their adoption is solely within the province of the legislature and cannot be effected by expedient modification of the rules of evidence. Jones v. United States, App. D.C., 386 A.2d 308 (1978), cert. denied, 444 U.S. 925, 100 S. Ct. 263, 62 L. Ed. 2d 181 (1979).

Prejudice in guilt phase of bifurcated trial requires second jury for insanity defense. — Where the defendant who is charged with murder contends during the guilt phase of his bifurcated trial that his killing was due to a rational belief that it was necessary because the victim had threatened him with serious bodily harm, the likelihood of prejudice is sufficient to require a 2nd jury to hear the insanity defense. United States v. Taylor, 510 F.2d 1283 (D.C. Cir. 1975).

Relevant issues in insanity hearing. — In an insanity hearing held in connection with a prosecution for murder, the issue is not the shortcomings of society generally, but rather the defendant's criminal responsibility. United States v. Alexander, 471 F.2d 923 (D.C. Cir.), cert. denied, 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494 (1972).

In a prosecution for second degree murder, the defendant is not entitled to reopen the question of malice in his insanity hearing. United States v. Alexander, 471 F.2d 923 (D.C. Cir.), cert. denied, 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494 (1972).

Wound descriptions admissible to rebut insanity defense. — Descriptions of the victim's wound may be introduced to establish the elements of the crime and to show that the defendant perpetrated the crime in a manner inconsistent with a defense of insanity. United States v. Cockerham, 476 F.2d 542 (D.C. Cir. 1973).

Evidence insufficient to show defendant acted out of fear or in the heat of passion.

— Where defendant provoked the attack, while decedent acted only to protect his friend, and defendant obtained a gun, and chased the victim back to his car where defendant shot him as

he tried to drive off, these circumstances provide no basis for a claim that defendant acted out of fear or in the heat of passion. *Price v. United States*, App. D.C., 602 A.2d 641 (1992).

Evidence sufficient to support insanity defense. — Evidence that the defendant suffered from a severe personality disorder that caused him on occasion to disassociate and that while in this state he did not have the capacity for choice or control is sufficient to support an insanity defense. *Harman v. United States*, App. D.C., 351 A.2d 504, cert. denied, 429 U.S. 841, 97 S. Ct. 116, 50 L. Ed. 2d 110 (1976).

In second degree murder proceeding, the voluntary taking of drugs is not a defense. *Barrett v. United States*, App. D.C., 377 A.2d 62 (1977).

Defendant may assert "blacking out". — The defendant may assert that he was of unsound mind at time of the commission of the homicide and that he "blacked out." *Bell v. United States*, 210 F.2d 711 (D.C. Cir. 1953), cert. denied, 347 U.S. 956, 74 S. Ct. 682, 98 L. Ed. 1101 (1954), cert. denied, 353 U.S. 924, 77 S. Ct. 684, 1 L. Ed. 2d 720 (1957), cert. denied, 356 U.S. 963, 78 S. Ct. 1002, 2 L. Ed. 2d 1070 (1958), cert. denied, 362 U.S. 924, 80 S. Ct. 679, 4 L. Ed. 2d 743 (1960).

One legally pursued by police no right to mortally wound. — A person who is being legally pursued by a police officer has no right to stand his ground and mortally wound the officer. *United States v. Taylor*, 510 F.2d 1283 (D.C. Cir. 1975).

Defense counsel may suggest that an accessory committed the murder. *United States v. DeLoach*, 504 F.2d 185 (D.C. Cir. 1974), cert. denied, 426 U.S. 909, 96 S. Ct. 2232, 48 L. Ed. 2d 834 (1976).

Waiver of double jeopardy defense. — Where jury returned a verdict of "not guilty" of second degree murder when it found defendant guilty of first degree murder, under § 22-2401, and where defendant's attorney failed to state an objection based on the Double Jeopardy Clause of the federal Constitution, in a later trial, defendant was found to have waived his constitutional right to raise the defense. *Towles v. United States*, App. D.C., 521 A.2d 651, cert. denied, 483 U.S. 1008, 107 S. Ct. 3236, 97 L. Ed. 2d 741 (1987).

D. Evidence.

Defendant entitled to put eyewitness to self-defense on stand. — Where the critical issue in a homicide prosecution is a claim of self-defense, the defendant is entitled to have his eyewitness put on the stand without any interference or intimidation by the prosecutor. *United States v. Smith*, 478 F.2d 976 (D.C. Cir. 1973).

Competency of longtime drug addict should be examined. — Where a witness in a prosecution for murder is a longtime drug addict who is still using drugs, his competency should be examined. *United States v. Crosby*, 462 F.2d 1201 (D.C. Cir. 1972).

But not of inherently competent government witnesses. — The court in a homicide prosecution may refuse to order a mental examination of a government witness where his testimony does not inherently suggest mental abnormality, where he has been determined to be competent, and where he is an eyewitness and not otherwise connected with the crime. *Albany v. United States*, App. D.C., 377 A.2d 1145 (1977).

Prosecution may rebut defendant's testimony. — Where the defendant in a second degree murder prosecution contends in his direct testimony that he has only recently begun carrying a weapon, the prosecution may introduce rebuttal testimony. *Curry v. United States*, App. D.C., 322 A.2d 268 (1974).

No adverse inference drawn from failure of alibi witness to contact police. — No adverse inference can be drawn from the failure of an alibi witness to contact the police or to give a statement to the police when he learned that the defendant was charged with homicide. *United States v. Young*, 463 F.2d 934 (D.C. Cir. 1972).

Examination by prosecutor found proper. — The court may permit the prosecutor in a homicide prosecution to inquire as to the character of the deceased after the defense counsel has initiated this line of inquiry. *United States v. Perkins*, 498 F.2d 1054 (D.C. Cir. 1974).

The court, in a second degree murder prosecution, may allow the prosecutor to ask the defendant's character witnesses whether they have heard of the defendant's prior arrests and convictions. *Parker v. United States*, App. D.C., 363 A.2d 975 (1976).

Impeachment found proper. — No improper impeachment in a second degree murder prosecution takes place where the prosecutor inquires as to previous terms of imprisonment served by the defendant after such confinements have been introduced in direct testimony. *Curry v. United States*, App. D.C., 322 A.2d 268 (1974).

Prior threats by defendant no indication of general culpability. — Evidence of a prior threat by the defendant against the deceased does not indicate that the defendant is generally culpable. *United States v. Bobbitt*, 450 F.2d 685 (D.C. Cir. 1971).

Hearsay statements of decedent indicating fear of defendant are admissible under the state of mind exception, but hearsay evidence of a prior specific act by the accused is

not. *Giles v. United States*, App. D.C., 432 A.2d 739 (1981).

Evidence of defendant's character held inadmissible. — See *Burrell v. United States*, App. D.C., 455 A.2d 1373 (1983).

Evidence admissible to prove deceased's character. — In a prosecution for murder, a prior conviction of child abuse is admissible to prove the deceased's violent character. *United States v. Burks*, 470 F.2d 432 (D.C. Cir. 1972).

Evidence not admissible to prove deceased's character. — The court may refuse to admit the arrest record of the deceased where there is no crime of violence on the record. *United States v. Perkins*, 498 F.2d 1054 (D.C. Cir. 1974).

Prior assaults on victim relevant and material. — Prior assaults on the victim by the defendant are relevant and material to the issues of malice, intent and wilfulness. *United States v. Thomas*, 459 F.2d 1172 (D.C. Cir. 1972).

And admissible. — Evidence that the defendant previously beat his child is admissible in a prosecution for causing the death of the child. *United States v. Grady*, 481 F.2d 1106 (D.C. Cir. 1973).

Evidence of similar shooting occurring shortly after murder was inadmissible to show common scheme or plan, but was admissible to show identity. *Groves v. United States*, App. D.C., 564 A.2d 372 (1989), modified on other grounds, App. D.C., 574 A.2d 265 (1990).

Evidence considered as consciousness of guilt. — In a prosecution for murder, if the defendant flees from the scene, this may be considered as a consciousness of guilt. *United States v. Edmonds*, 63 F. Supp. 968 (D.D.C. 1946).

Testimony of the circumstances surrounding the defendant's arrest on an unrelated charge is admissible as indicating a consciousness of guilt of the murder. *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966).

Evidence found admissible. — In a prosecution for murder, a forged letter written by the accused and purporting to be a confession of murder by a fictitious person is admissible. *Harris v. United States*, 169 F.2d 887 (D.C. Cir.), cert. denied, 335 U.S. 872, 69 S. Ct. 161, 93 L. Ed. 416 (1948).

Evidence of "bad blood" between the defendant and the deceased is admissible in a prosecution for second degree murder. *United States v. Bobbitt*, 450 F.2d 685 (D.C. Cir. 1971).

In a murder prosecution, the court may admit photographs which are probative of the place where the victim was shot and which are material on the issues in the case. *United States v. Smith*, 490 F.2d 789 (D.C. Cir. 1974).

In a murder prosecution, testimony concerning the defendant's homosexual relationship with the victim is admissible, as it is highly

relevant to the question of motive or intent, so long as it is not presented in such a way as to be unduly inflammatory. *Smith v. United States*, App. D.C., 381 A.2d 258 (1977).

Victim's last words may be admissible. — In a homicide prosecution, the victim's last words may be admissible under the spontaneous utterance exception the hearsay rule. *Nicholson v. United States*, App. D.C., 368 A.2d 561 (1977).

Cumulative and remote evidence may be excluded. — The exclusion of testimony as to a defendant's state of mind is not an abuse of discretion and is not prejudicial where it is cumulative and more remote than the evidence already admitted. In re *Bumphus*, App. D.C., 254 A.2d 400 (1969).

As may statement corroborating self-serving exculpatory statement. — In a murder prosecution, a written statement which corroborates an oral exculpatory statement that is self-serving may be excluded. *United States v. Smith*, 490 F.2d 789 (D.C. Cir. 1974).

E. Instructions.

In a homicide prosecution, the statements of counsel are not evidence. *Jackson v. United States*, App. D.C., 329 A.2d 782 (1974), cert. denied, 423 U.S. 851, 96 S. Ct. 95, 46 L. Ed. 2d 74 (1975).

In a homicide prosecution, the prosecutor's statements are not evidence. *Robinson v. United States*, App. D.C., 361 A.2d 199 (1976).

Statements and arguments of counsel are not evidence. *Villacres v. United States*, App. D.C., 357 A.2d 423 (1976).

Prosecutor's comments found not substantially prejudicial. — In a homicide prosecution, the defendant is not substantially prejudiced by a closing argument which suggests that life meant "almost nothing" to the defendant because he had been in the military. *Bennett v. United States*, App. D.C., 375 A.2d 499 (1977).

Prosecutor's comments found improper. — The prosecutor's characterization of killings as "executions" and "assassinations" is improper. *United States v. DeLoach*, 504 F.2d 185 (D.C. Cir. 1974), cert. denied, 426 U.S. 909, 96 S. Ct. 2232, 48 L. Ed. 2d 834 (1976).

Highly prejudicial comments on 1 defendant may lead to reversal of codefendant's conviction. — Where the prosecutor's comments on the insanity defense of a defendant are so highly prejudicial as to require a reversal, the conviction of a codefendant who asserted a lack of intent to commit murder must also be nullified. *United States v. Hawkins*, 480 F.2d 1151 (D.C. Cir. 1973).

But comments not objected to below not noticeable on appeal. — In a prosecution for second degree murder, any of the prosecutor's

remarks which are not objected to at trial are not noticeable for the first time on appeal. *Lloyd v. United States*, App. D.C., 333 A.2d 387 (1975).

First and second degree murder need not be charged in the alternative. *Fuller v. United States*, 407 F.2d 1199 (D.C. Cir. 1967), cert. denied, 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125 (1969).

Instruction where 2 forms of first degree murder arising from 1 killing charged. — When a defendant is charged with 2 forms of first degree murder arising from the same killing, the court may not only submit a second degree murder charge under the first degree premeditated murder charge but may also submit a second degree murder charge to the jury as a lesser included offense under the felony murder charge. *Turner v. United States*, App. D.C., 459 A.2d 1054 (1983).

Double jeopardy defense not waived by agreeing to 2 instructions for 1 killing. — By agreeing to the court's instructions, including 2 second degree murder instructions for a single killing, the defendant did not waive any double jeopardy defense. *Turner v. United States*, App. D.C., 459 A.2d 1054 (1983).

In a homicide prosecution, failure to define "malice aforethought" constitutes plain error and leads to a reversal of the murder conviction. *McDonald v. United States*, 284 F.2d 232 (D.C. Cir. 1960).

Charge in a homicide prosecution should focus primarily on defendant's actual thought processes in terms of meditation and a conscious weighing of the alternatives, the appreciable time element being subordinate. *Austin v. United States*, 382 F.2d 129 (D.C. Cir. 1967), overruled on other grounds, *United States v. Foster*, 783 F.2d 1082 (D.C. Cir. 1986).

But "appreciable time" charge should be given when requested. — The "appreciable time" charge in a homicide prosecution is a meaningful way to convey to the jury the core meaning of premeditation and deliberation and it should be given where specifically requested by the defense. *Austin v. United States*, 382 F.2d 129 (D.C. Cir. 1967), overruled on other grounds, *United States v. Foster*, 783 F.2d 1082 (D.C. Cir. 1986).

Lesser included offense instruction held proper. — Trial judge did not commit plain error in failing to give a lesser included offense instruction on second degree felony murder that would allow a conviction of second degree murder if the jury found defendant had committed an underlying felony, where the attendant homicide resulted from the killer's own agenda rather than the common purpose of the felony. *Everetts v. United States*, App. D.C., 627 A.2d 981 (1993), cert. denied, — U.S. —, 115 S. Ct. 144, 130 L. Ed. 2d 84 (1994).

Jury may be instructed on second degree murder as a lesser included offense where the indictment is solely for felony murder. *Fuller v. United States*, 407 F.2d 1199 (D.C. Cir. 1967), cert. denied, 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125 (1969).

But instruction unnecessary unless evidence warrants. — The court must charge that if the jury believes the defendant guilty of killing, but if any reasonable doubt exists as to whether he committed murder first or murder second, it should be resolved in favor of the lesser crime, only where from the evidence as a whole, the jury might reasonably find him guilty in either degree and must decide which degree. *Goodall v. United States*, 180 F.2d 397 (D.C. Cir.), cert. denied, 339 U.S. 987, 70 S. Ct. 1009, 94 L. Ed. 1389 (1950).

Where it cannot be determined from the evidence whether the defendant intended to kill or merely wound his victim and it cannot be said with legal certainty whether there was or was not sufficient time for premeditation, the court should submit a lesser included offense of second degree murder in a prosecution for first degree murder. *Hansborough v. United States*, 308 F.2d 645 (D.C. Cir. 1962).

An instruction on second degree murder as a lesser included offense of felony murder should be given where the evidence so warrants and the defendant makes a timely request therefor. *United States v. Robinson*, 475 F.2d 376 (D.C. Cir. 1973).

In felony murder prosecution, failure to instruct jury as to lesser included offense of second degree murder was not error where to give such an instruction would have required a "bizarre reconstruction" of the evidence. *Wood v. United States*, App. D.C., 472 A.2d 408 (1984).

Proper instruction on second degree murder as lesser included offense. — If the defendant insists that a charge of second degree murder be submitted to the jury solely as a lesser offense included within a first degree murder charge, and if he makes a timely motion or objection, he is entitled to an instruction directing the jury: (1) To first consider the issue of guilt as to first degree murder; (2) in the event of acquittal, to consider guilt of second degree murder; and (3) in the event of a guilty verdict of first degree murder, to enter no verdict concerning second degree murder. *United States v. Butler*, 455 F.2d 1338 (D.C. Cir. 1971).

Second degree murder charge precedent to manslaughter instructions. — Instructions concerning the distinction between manslaughter and second degree murder and the factors that will reduce murder to manslaughter are appropriate only where the defendant is charged with second degree murder as well as manslaughter. *United States v.*

Alexander, 471 F.2d 923 (D.C. Cir.), cert. denied, 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494 (1972).

Instructions on malice held proper. — Instructions that “express malice” may exist “where one unlawfully kills another in pursuance of a wrongful act or unlawful purpose without legal excuse” and that “implied malice” could be found where one’s behavior is so reckless or wanton that it manifests a disregard of human life did not impermissibly allow the jurors to find malice if they simply determined that victim’s death was the proximate result of defendant’s speeding to evade the police. *Powell v. United States*, App. D.C., 485 A.2d 596 (1984), cert. denied, 474 U.S. 981, 106 S. Ct. 420, 88 L. Ed. 2d 339 (1985).

Evidence insufficient to support manslaughter instruction. — Evidence in a prosecution for second degree murder which shows that the killing occurred during an argument and that the victim was shot in the back is insufficient to support an instruction on involuntary manslaughter. *Robinson v. United States*, App. D.C., 361 A.2d 199 (1976).

Defendant in second degree murder prosecution was not entitled to a jury instruction on manslaughter as a lesser included offense where it was undisputed that the victim had been brutally beaten and thus the jury could not rationally infer the absence of malice, an element essential for murder but not present in manslaughter. *Day v. United States*, App. D.C., 390 A.2d 957 (1978), rev’d on other grounds sub nom. *Graves v. United States*, App. D.C., 490 A.2d 1086 (1984).

Sample provocation instruction to be given. — The sample instruction on provocation is to be given where the accused is charged with second degree murder and manslaughter and adequate provocation is put in issue. *United States v. Alexander*, 471 F.2d 923 (D.C. Cir.), cert. denied, 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494 (1972).

No error where no objection to standard instructions. — Error does not occur in a second degree murder prosecution where the instructions given are standard instructions on manslaughter and second degree murder no objection is made. *Curry v. United States*, App. D.C., 322 A.2d 268 (1974).

Improper instruction on motive. — Where a prior act is introduced upon the issue of motive and there is no contest as to the defendant’s presence and opportunity to commit the homicide, it was not plain error to fail to instruct that the jury cannot consider the act unless it first determines that the defendant committed the killing. *United States v. Bobbitt*, 450 F.2d 685 (D.C. Cir. 1971).

Instruction on mitigation of malice. — Sufficient evidence of provocation was presented to support the requested defense in-

struction on mitigation of malice, malice being an essential element of second degree murder to be proved by the government. *Bostick v. United States*, App. D.C., 605 A.2d 916 (1992).

Failure to give instruction supported by evidence reversible error. — Where there is some evidence that the defendant lacked the requisite malice for second degree murder, failure to give an instruction on manslaughter is reversible error. *Pendergrast v. United States*, App. D.C., 332 A.2d 919 (1975).

Self-defense instruction properly refused where testimony indicates victim killed by third person. — The court may refuse an instruction on self-defense in a murder prosecution where the defendant’s own testimony indicates that the victim was killed by a third person. *United States v. Crowder*, 543 F.2d 312 (D.C. Cir. 1976), cert. denied, 429 U.S. 1062, 97 S. Ct. 788, 50 L. Ed. 2d 779 (1977).

Proper instruction on consequences of acquittal by reasons on insanity. — A defendant who relies on the defense of insanity is entitled to an instruction that if he is acquitted by reason of insanity he will be confined in a mental hospital until it is determined that he is no longer dangerous to himself or others. *McDonald v. United States*, 312 F.2d 847 (D.C. Cir. 1962).

Intoxication instruction unnecessary unless evidence warrants. — In a homicide prosecution, the court may fail to include an intoxication instruction where the evidence does not warrant. *Nicholson v. United States*, App. D.C., 368 A.2d 561 (1977).

Court may deny “missing witness” instruction for person not within government’s control. — In a murder prosecution, the trial court may deny a missing witness instruction with respect to the absence of a person not within the “peculiar” control of the government. *United States v. Clayborne*, 509 F.2d 473 (D.C. Cir. 1974).

F. Verdict.

Asking undecided jury to come back to consider lesser charge not coercive. — Where it is apparent that the jury has determined that the facts present a question as to whether the defendant is guilty of second degree murder or manslaughter, asking them to come back on the following day to see if they can reach a verdict on the lesser charge is not coercive. *United States v. Smoot*, 463 F.2d 1221 (D.C. Cir. 1972).

Court may require jury to determine sanity on each of several counts. — In a trial on multiple charges, including murder, the court may require the jury to make a separate determination of sanity on each count for which the defendant is found guilty. *Harman v. United States*, App. D.C., 351 A.2d 504, cert.

denied, 429 U.S. 841, 97 S. Ct. 116, 50 L. Ed. 2d 110 (1976).

Jury should consider evidence separately against each defendant. — In a murder prosecution, the jury should be instructed to consider the evidence individually against each of several defendants. *United States v. Hurt*, 476 F.2d 1164 (D.C. Cir. 1973).

Inconsistent verdicts for robbery and murder stand where they are consistent with the evidence. *Jackson v. United States*, 313 F.2d 572 (D.C. Cir. 1962).

Preponderance of competent evidence is needed to sustain conviction of juvenile of manslaughter. In re *Bumphus*, App. D.C., 254 A.2d 400 (1969).

Verdict form which confuses issues of guilt and insanity improper. — A verdict form used in the insanity phase of a bifurcated trial which gives the jury a choice of determining whether to adhere to the decision previously reached or to find the defendant not guilty by reason of insanity confuses the issues and is improper. *United States v. Taylor*, 510 F.2d 1283 (D.C. Cir. 1975).

Circumstances under which court may deny withdrawal of guilty plea. — The court may deny a motion for a withdrawal of a guilty plea to second degree murder of where the reasons given do not amount to a claim of legal innocence, evidence of guilt is overwhelmingly convincing, and there is no claim of coercion or incapacity. *Taylor v. United States*, App. D.C., 366 A.2d 444 (1976).

Acquittal in felony murder context as bar to second prosecution arising from same killing in premeditated murder context. — Under the principle of collateral estoppel, a defendant's acquittal of second degree murder as a lesser included offense of felony murder bars a second prosecution arising from the same killing for second degree murder as a lesser included offense of premeditated murder. *Turner v. United States*, App. D.C., 459 A.2d 1054 (1983).

Evidence sufficient to support guilty verdict. — Evidence that the defendant was armed and was threatening an individual with serious bodily injury, that he was aware that he was being followed and that he turned and shot the decedent is sufficient, apart from the issue of mental responsibility, to support a guilty verdict of second degree murder. *United States v. Taylor*, 510 F.2d 1283 (D.C. Cir. 1975).

Evidence that the defendant approached the deceased with a knife and wantonly stabbed him during an altercation, resulting in death, warrants a conviction of murder in the second degree. *United States v. Edmonds*, 63 F. Supp. 968 (D.D.C. 1946); *Thomas v. United States*, 158 F.2d 97 (D.C. Cir. 1946), cert. denied, 331 U.S. 822, 67 S. Ct. 1303, 91 L. Ed. 1838 (1947).

In a murder prosecution evidence showing a

continuous association of the defendant with the person who shot the victim, their furtive consultation immediately preceding the murder and his standing close by while the actual killer fought with and shot the victim sustains a conviction of second degree murder. *United States v. Clayborne*, 509 F.2d 473 (D.C. Cir. 1974).

Evidence sufficient to sustain conviction. — See *Branch v. United States*, App. D.C., 382 A.2d 1033 (1978); *Stewart v. United States*, App. D.C., 383 A.2d 330 (1978); *Fox v. United States*, App. D.C., 421 A.2d 9 (1980); *Gayden v. United States*, App. D.C., 584 A.2d 578 (1990), cert. denied, 502 U.S. 843, 112 S. Ct. 137, 116 L. Ed. 2d 104 (1991); *Luchie v. United States*, App. D.C., 610 A.2d 248 (1992).

G. Sentence.

Cumulative punishment for dual convictions of first degree and second degree murder. — Although one may be found guilty of both first degree murder and second degree murder, this does not mean that he is subject to cumulative punishment. *Fuller v. United States*, 407 F.2d 1199 (D.C. Cir. 1967), cert. denied, 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125 (1969).

Concurrent sentences may be imposed for second degree murder and carrying pistol without license. *United States v. Bobbitt*, 450 F.2d 685 (D.C. Cir. 1971).

Indeterminate Sentence Act (§ 24-203) is inapplicable to second degree murder. *Anderson v. Rives*, 85 F.2d 673 (D.C. Cir. 1936).

H. Appeal.

Request for a mistrial in a murder prosecution nullifies any attachment of jeopardy and the government is free to proceed as though no trial had ever begun. *Jamison v. United States*, App. D.C., 373 A.2d 594 (1977).

Reindictment for first degree murder following mistrial for second degree murder unconstitutional, absent justification. — A reindictment for first degree murder following a mistrial for second degree murder is a denial of due process, absent any showing of justification for the increase in the degree of the crime charged. *United States v. Jamison*, 505 F.2d 407 (D.C. Cir. 1974).

Entering manslaughter conviction on remand over defendant's objection improper. — Where defendant was convicted of second degree murder and the trial court's refusal to give manslaughter instruction was but one of several errors committed, the trial court on remand could not enter a conviction for manslaughter at the government's request where the defendant objected and sought a new trial. *Pendergrast v. United States*, App. D.C., 385 A.2d 173 (1978).

Government estopped from using evidence from first trial. — Where in the first trial the jury acquitted defendant of use of an automobile without the owner's consent, armed robbery and assault with a dangerous weapon, the government was collaterally estopped from having the evidence supporting those counts admitted against the defendant in a second

trial charging him with making 4 sawed-off shotguns, first degree murder while armed, second degree murder while armed, unlawful possession of 5 sawed-off shotguns and being an accessory after the fact to first degree and second degree murder. *United States v. Day*, 591 F.2d 861 (D.C. Cir. 1978).

§ 22-2404. Penalty for murder in first and second degrees.

(a) The punishment for murder in the first degree shall be life imprisonment, except that the court may impose a punishment of life imprisonment without parole in accordance with § 22-2404.1. The prosecution shall notify the defendant in writing at least 30 days prior to trial that it intends to seek a sentence of life imprisonment without parole as provided in § 22-2404.1; provided that, no person who was less than 18 years of age at the time the murder was committed shall be sentenced to life imprisonment without parole.

(b) Notwithstanding any other provision of law, a person convicted of murder in the first degree and upon whom a sentence of life imprisonment is imposed shall be eligible for parole only after the expiration of 30 years from the date of the commencement of the sentence.

(c) Whoever is guilty of murder in the second degree shall be sentenced to a maximum period of incarceration of not less than 20 years and not more than life. Notwithstanding any other provision of law, where the maximum sentence imposed is life imprisonment, a minimum sentence shall be imposed which shall not exceed 20 years imprisonment. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 801; Jan. 30, 1925, 43 Stat. 798, ch. 115, § 1; Mar. 22, 1962, 76 Stat. 46, Pub. L. 87-423, § 1; 1973 Ed., § 22-2404; Feb. 26, 1981, D.C. Law 3-113, § 2, 27 DCR 5624; Sept. 26, 1992, D.C. Law 9-153, § 2(b), (c), 39 DCR 3868; May 23, 1995, D.C. Law 10-256, § 2(a), 42 DCR 20.)

Cross references. — As to additional penalty for committing crime when armed, see §§ 22-3201 and 22-3202.

As to minimum sentence upon imposition of life imprisonment, see § 24-203.

Section references. — This section is referred to in §§ 11-502, 22-2404.1, and 24-434.

Effect of amendments. — D.C. Law 10-256 rewrote (c).

Legislative history of Law 3-113. — Law 3-113, the "District of Columbia Death Penalty Repeal Act of 1980," was introduced in Council and assigned Bill No. 3-395, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on November 12, 1980 and December 9, 1980, respectively. Signed by the Mayor on December 17, 1980, it was assigned Act No. 3-307 and transmitted to both Houses of Congress for its review.

Legislative history of Law 9-153. — See note to § 22-2404.1.

Legislative history of Law 10-256. — Law 10-256, the "Public Safety and Law Enforce-

ment Support Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-628, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on November 1, 1994, and December 6, 1994, respectively. Signed by the Mayor on December 28, 1994, it was assigned Act No. 10-375 and transmitted to both Houses of Congress for its review. D.C. Law 10-256 became effective May 23, 1995.

Rejection of Initiative on Mandatory Life Imprisonment or Death Penalty for Murder in the District of Columbia. — Section 138 of Pub. L. 102-382, 106 Stat. 1436, the District of Columbia Appropriations Act, 1993, provided an initiative measure which would have increased the penalty for first degree murder in the District of Columbia to a sentence of death or life imprisonment without the possibility of parole; the initiative was rejected at the general election held on November 3, 1992.

It is not lapse of time which constitutes deliberation necessary for first degree

murder but the reflection and turning over in the mind of a design and purpose to kill. *Parman v. United States*, 399 F.2d 559 (D.C. Cir.), cert. denied, 393 U.S. 858, 89 S. Ct. 109, 21 L. Ed. 2d 126 (1968).

Evidence sufficient to support premeditation finding. — Evidence that the deceased was assaulted, bound with rope, tied to a chair and then killed by strangulation from behind while still tightly bound is sufficient to support a finding of premeditation. *Parman v. United States*, 399 F.2d 559 (D.C. Cir.), cert. denied, 393 U.S. 858, 89 S. Ct. 109, 21 L. Ed. 2d 126 (1968).

Accidental killing second degree murder. — If the defendant did not have a purpose to kill or if he killed accidentally, he is guilty of murder in the second degree. *Marcus v. United States*, 86 F.2d 854 (D.C. Cir. 1936).

Distinction between first degree and second degree murder. — Second degree murder is not defined to exclude all crimes that come within the first degree murder definition. *Fuller v. United States*, 407 F.2d 1199 (D.C. Cir. 1967), cert. denied, 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125 (1969).

All homicides with malice are murder, except those particularly heinous murders listed in § 22-2401. *Fuller v. United States*, 407 F.2d 1199 (D.C. Cir. 1967), cert. denied, 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125 (1969).

First and second degree murder do not have to be charged in the alternative, as their substantive elements do not conflict. *Fuller v. United States*, 407 F.2d 1199 (D.C. Cir. 1967), cert. denied, 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125 (1969).

Failure to charge. — Defendants were properly convicted of voluntary manslaughter although charged with second degree murder while armed; the court avoided misapplication of this section by not imposing the fine for voluntary manslaughter. *Lee v. United States*, App. D.C., 668 A.2d 822 (1995).

Offenses of murder, housebreaking, and larceny are historically independent crimes. *United States v. Butler*, 462 F.2d 1195 (D.C. Cir. 1972).

Evidence sufficient to defeat intoxication defense to first degree murder. — Testimony by police officers which indicates that the defendant was not intoxicated when arrested is sufficient evidence to defeat a defense of intoxication to first degree murder. *Jarmans v. United States*, 303 F. Supp. 763 (D.D.C. 1969).

In a murder prosecution, a defense of insanity may be raised. *Stewart v. United States*, 366 U.S. 1, 81 S. Ct. 941, 6 L. Ed. 2d 84 (1961).

As well as mental impairment. — Mental illness, the impairment of the normal will to protect oneself, is a defense against the making

of inculpatory statements. *Stewart v. United States*, 366 U.S. 1, 81 S. Ct. 941, 6 L. Ed. 2d 84 (1961).

But court may deny bifurcated trial with 2 juries. — The court may deny a motion for a bifurcated trial with 2 juries on the issues of insanity and the defense to the merits. *Parman v. United States*, 399 F.2d 559 (D.C. Cir.), cert. denied, 393 U.S. 858, 89 S. Ct. 109, 21 L. Ed. 2d 126 (1968).

Questions of guilt and punishment may be submitted together to the jury. *United States v. White*, 225 F. Supp. 514 (D.D.C. 1963), rev'd on other grounds, 349 F.2d 965 (D.C. Cir. 1965).

"Appreciable time" charge should be given where requested. — An "appreciable time" charge in a homicide prosecution is a meaningful way to convey to the jury the core meaning of premeditation and deliberation and it should be given where specifically requested by the defense. *Austin v. United States*, 382 F.2d 129 (D.C. Cir. 1967), overruled on other grounds, *United States v. Foster*, 783 F.2d 1082 (D.C. Cir. 1986).

This section imposes minimum sentence for first degree murder and is automatically embodied in every sentence imposed for such crime. *Bryant v. Civiletti*, 663 F.2d 286 (D.C. Cir. 1981).

Judge has no discretion when passing sentence on first degree murder conviction. *Garris v. United States*, App. D.C., 491 A.2d 511 (1985).

This section and § 24-203(a) establish 15-year maximum minimum sentence for second degree murder. — To avoid the "absurd result" of a higher minimum sentence for second degree murder than first degree, § 24-203(a), when considered in combination with this section, must be construed as establishing a 15-year maximum minimum sentence for second degree murder. *Haney v. United States*, App. D.C., 473 A.2d 393 (1984).

Fifteen-year minimum for sentences of "life imprisonment" for other offenses does not apply to sentences of life imprisonment for first degree murder, because of this section's status as a special statute applicable to every sentence to life imprisonment for first degree murder. *Bryant v. Civiletti*, 663 F.2d 286 (D.C. Cir. 1981).

Cumulative punishment for dual convictions of first degree and second degree murder. — Although the defendant may be found guilty of both first degree murder and second degree murder, this does not mean that he is subject to cumulative punishment. *Fuller v. United States*, 407 F.2d 1199 (D.C. Cir. 1967), cert. denied, 393 U.S. 1120, 89 S. Ct. 999, 22 L. Ed. 2d 125 (1969).

Cumulative punishment permitted. — Cumulative punishment for felony murder and

for a rape, the proof of which is separate, is permitted. *Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980).

Defendant found guilty of second degree murder, housebreaking, and larceny may be sentenced consecutively. *United States v. Butler*, 462 F.2d 1195 (D.C. Cir. 1972).

Unauthorized consecutive sentences. — Congress did not authorize consecutive sentences for rape and for a killing committed in the course of the rape. *Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980).

Authority of judge to reduce or vacate sentence. — A judge is not disqualified from passing upon motions to reduce or vacate a sentence for murder by the fact that he is not the judge who originally presided. *Coleman v. United States*, 334 F.2d 558 (D.C. Cir. 1964).

Challenge to judge's sentencing authority cannot be made for first time on appeal. *Coleman v. United States*, 334 F.2d 558 (D.C. Cir. 1964).

District not within jurisdiction of federal homicide provisions. — The District is not within the "special maritime and territorial jurisdiction of the United States" within the meaning of the federal homicide statute. *Coleman v. United States*, 334 F.2d 558 (D.C. Cir. 1964).

Indeterminate Sentence Act (§ 24-203) is inapplicable to second degree murder. *Anderson v. Rives*, 85 F.2d 673 (D.C. Cir. 1936).

Authority to grant probation not restricted by federal provisions. — The authority of the court to grant probation under § 16-710 in a case where a person has been convicted of a crime that is punishable by life imprisonment is not restricted by the provisions of the federal Probation Act. *Sanker v. United States*, App. D.C., 374 A.2d 304 (1977).

Aggregation of consecutive sentences proper for determining parole eligibility. — Since all criminal offenses in violation of the United States Code and the District of Columbia Code are federal offenses against the same sovereign, it is proper to aggregate consecutive sentences for the purpose of determining parole eligibility. *Bryant v. Civiletti*, 663 F.2d 286 (D.C. Cir. 1981).

Aggregate minimum time to be served on consecutive sentences constitutes the basis upon which the length of the sentence shall be considered in determining the earliest date for parole eligibility, even though this section does not so provide. *Bryant v. Civiletti*, 663 F.2d 286 (D.C. Cir. 1981).

Bar to parole not superseded by federal law. — The general eligibility section (18 U.S.C. § 4205 (a)) of the federal Parole Act did not supersede the specific 20-year bar to parole contained in this section. *Frady v. United*

States Bureau of Prisons, 570 F.2d 1027 (D.C. Cir. 1978).

Authority of appellate court to lessen sentence limited by Congressional action.

— Congress has fixed the severity of the sentence for first degree murder in recognition of the uniqueness of the crime, such that it would be impossible for an appellate court, in the face of such Congressional action, to authorize a sentencing judge who sentences a first degree murderer to life imprisonment then to suspend execution of this sentence and to place such defendant on probation. *Beale v. United States*, App. D.C., 465 A.2d 796 (1983), cert. denied, 465 U.S. 1030, 104 S. Ct. 1293, 79 L. Ed. 2d 694 (1984).

Finding of second degree murder in the alternative bars retrial for first degree murder. — Where the jury is authorized to find either first degree murder or, alternatively, second degree murder and finds second degree murder, and, subsequently, the conviction is reversed, the defendant cannot be tried again for first degree murder. *Green v. United States*, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957).

Good time credits do not reduce minimum sentence. — The District of Columbia Good Time Credits Act of 1986 (§ 24-429 et seq.) does not apply to persons convicted of first degree murder; these persons would continue to serve the full 20-year term without parole, notwithstanding the enactment of the Good Time Credits Act. *Winters v. Ridley*, App. D.C., 596 A.2d 569 (1991).

Error in sentencing range. — Where judge committed himself to a sentencing range of a maximum of 28 to 84 years, he misinformed defendant, since by statute the judge was required to impose a life sentence on the first degree murder count. *Wilson v. United States*, App. D.C., 592 A.2d 1009, cert. denied, 502 U.S. 1017, 112 S. Ct. 666, 116 L. Ed. 2d 757 (1991).

Cited in *Johnson v. United States*, 225 U.S. 405, 32 S. Ct. 748, 56 L. Ed. 1142 (1912); *Frady v. United States*, 348 F.2d 84 (D.C. Cir.), cert. denied, 382 U.S. 909, 86 S. Ct. 247, 15 L. Ed. 2d 160 (1965); *United States v. Howard*, 470 F.2d 374 (D.C. Cir. 1972); *United States v. Frady*, 607 F.2d 383 (D.C. Cir. 1979); *Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980); *United States v. Bryant*, 663 F.2d 293 (D.C. Cir. 1981); *United States v. McClurkin*, 110 WLR 1657 (Super. Ct.); *Shelvy v. Whitfield*, 718 F.2d 441 (D.C. Cir. 1983); *Hawthorne v. United States*, App. D.C., 504 A.2d 580, cert. denied, 479 U.S. 992, 107 S. Ct. 593, 93 L. Ed. 2d 594 (1986); *Townsend v. United States*, App. D.C., 512 A.2d 994 (1986), cert. denied, 481 U.S. 1052, 107 S. Ct. 2188, 95 L. Ed. 2d 843 (1987); *Towles v. United States*, App. D.C., 521 A.2d 651, cert. denied, 483 U.S. 1008, 107 S. Ct. 3236, 97 L. Ed. 2d 741 (1987);

United States v. Williams, 116 WLR 1005 (Sup. Ct.); David v. United States, App. D.C., 579 A.2d 1172 (1990); Poole v. Kelly, 954 F.2d 760 (D.C. Cir. 1992).

§ 22-2404.1. Sentencing procedure for murder in the first degree.

(a) If a defendant is convicted of murder in the first degree, and if the prosecution has given the notice required under § 22-2404(a), a separate sentencing procedure shall be conducted as soon as practicable after the trial has been completed to determine whether to impose a sentence of life imprisonment or life imprisonment without possibility of parole.

(b) In determining the sentence, the court shall consider whether, beyond a reasonable doubt, any of the following aggravating circumstances exist:

(1) The murder was committed in the course of kidnapping or abduction, or an attempt to kidnap or abduct;

(2) The murder was committed for hire;

(3) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(4) The murder was especially heinous, atrocious, or cruel;

(5) The murder was a drive-by or random shooting;

(6) There was more than 1 offense of murder in the first degree arising out of 1 incident;

(7) The murder was committed because of the victim's race, color, religion, national origin, or sexual orientation;

(8) The murder was committed while committing or attempting to commit a robbery, arson, rape, or sexual offense;

(9) The murder was committed because the victim was or had been a witness in any criminal investigation or judicial proceeding, or the victim was capable of providing or had provided assistance in any criminal investigation or judicial proceeding;

(10) The murder victim was especially vulnerable due to age or a mental or physical infirmity;

(11) The murder is committed after substantial planning; or

(12) At the time of the commission of the murder, the defendant had previously been convicted and sentenced, whether in a court of the District of Columbia, of the United States, or of any state, for (A) murder, (B) manslaughter, (C) any attempt, solicitation, or conspiracy to commit murder, (D) assault with intent to kill, (E) assault with intent to murder, or (F) at least twice, for any offense or offenses, described in § 22-3201(f), whether committed in the District of Columbia or any other state, or the United States. A person shall be considered as having been convicted and sentenced twice for an offense or offenses when the initial sentencing for the conviction in the first offense preceded the commission of the second offense and initial sentencing for the second offense preceded the commission of the instant murder.

(c) The court shall state in writing whether, beyond a reasonable doubt, 1 or more of the aggravating circumstances exist. If the court finds that 1 or more aggravating circumstances exist, a sentence of life imprisonment without parole may be imposed.

(d) If the trial court is reversed on appeal because of error only in the separate sentencing procedure, any new proceeding before the trial court shall pertain only to the issue of sentencing. (Mar. 3, 1901, ch. 854, § 801a, as added Sept. 26, 1992, D.C. Law 9-153, § 2(d), 39 DCR 3868; May 23, 1995, D.C. Law 10-256, § 2(b), 42 DCR 20.)

Section references. — This section is referred to in § 22-2404.

Effect of amendments. — D.C. Law 10-256 added (b)(11) and (12).

Legislative history of Law 9-153. — Law 9-153, the “First Degree Murder Amendment Act of 1992,” was introduced in Council and assigned Bill No. 9-118, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on April 7, 1992, and May 6, 1992, respectively. Signed by the Mayor on May 28, 1992, it was assigned Act No. 9-213 and transmitted to both Houses of

Congress for its review. D.C. Law 9-153 became effective on September 26, 1992.

Legislative history of Law 10-256. — See note to § 22-2404.

Right to speedy trial. — Untimely filing of the “Notice of Intent to Seek Sentence of Life Imprisonment Without Parole” did not constitute such actual prejudice as to warrant dismissal of the case for denying the defendant his constitutional right to a speedy trial. *United States v. Montgomery*, 123 WLR 1665 (Super. Ct. 1995).

§ 22-2405. Penalty for manslaughter.

Whoever is guilty of manslaughter shall be sentenced to a period of imprisonment not exceeding 30 years. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 802; 1973 Ed., § 22-2405; May 23, 1995, D.C. Law 10-256, § 2(c), 42 DCR 20.)

Cross references. — As to additional penalty for committing crime when armed, see §§ 22-3201 and 22-3202.

As to negligent homicide, see §§ 40-713 and 40-714.

Section references. — This section is referred to in §§ 11-502 and 40-717.1.

Effect of amendments. — D.C. Law 10-256 rewrote this section.

Legislative history of Law 10-256. — See note to § 22-2404.

Common law definition of manslaughter is used in the District. *United States v. Pender*, App. D.C., 309 A.2d 492 (1973).

This section provides the penalty to be imposed for conviction of manslaughter; however, in the District of Columbia the elements of the offense have not been codified, but remain defined by common law. *Davis v. United States*, App. D.C., 510 A.2d 1051 (1986).

“Manslaughter” defined. — “Manslaughter” is the unlawful killing of a human being without malice aforethought. *United States v. Edmonds*, 63 F. Supp. 968 (D.D.C. 1946); *Fryer v. United States*, 207 F.2d 134 (D.C. Cir.), cert. denied, 346 U.S. 885, 74 S. Ct. 135, 98 L. Ed. 389 (1953).

“Manslaughter” is the unlawful, and unexcused killing of a human being without malice. *United States v. Alexander*, 471 F.2d 923 (D.C. Cir.), cert. denied, 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494 (1972).

“Involuntary manslaughter” defined. — “Involuntary manslaughter” is a killing without justification or excuse. *United States v. Pender*, App. D.C., 309 A.2d 492 (1973).

Involuntary manslaughter includes: (1) An unreasonable failure to perceive the risk of harm to others; while engaging in (2) conduct resulting in extreme danger to life or of serious bodily injury. *Faunteroy v. United States*, App. D.C., 413 A.2d 1294 (1980); *Fornah v. United States*, App. D.C., 460 A.2d 556 (1983).

Determining offense. — The offense of manslaughter is determined by reference to the number of victims who die as a result of the defendant’s actions, not by reference to the number of acts causing death, and trial court did not err in sentencing defendant on seven counts of manslaughter. *Williams v. United States*, App. D.C., 569 A.2d 97 (1989).

Applicability of § 22-3202(a). — To allow application of the enhancement of conviction statute (while armed) to a charge of involuntary manslaughter causes an inherent conflict between the two convictions; and where the “weapon” involved is an automobile, the inappropriateness of enhancement of an involuntary manslaughter conviction as “while armed” is manifest. *Reed v. United States*, App. D.C., 584 A.2d 585 (1990).

The possession of instruments — like firearms — “designed” as weapons may enhance the punishment for involuntary manslaughter.

Morris v. United States, App. D.C., 648 A.2d 958 (1994).

There is nothing inherently contradictory or unreasonable in saying that Congress, in § 22-3202, gave notice that unintentional killings could receive enhanced punishment precisely because of the heightened risk of such death from playing with a loaded gun in front of others. *Morris v. United States*, App. D.C., 648 A.2d 958 (1994).

Reckless conduct resulting in death may constitute manslaughter. *United States v. Dixon*, 419 F.2d 288 (D.C. Cir. 1969).

Requisite intent for involuntary manslaughter is supplied by gross or criminal negligence, which is a lack of awareness or failure to perceive the risk of injury from a course of conduct under circumstances in which the actor should have been aware of the risk. *Hawkins v. United States*, App. D.C., 395 A.2d 45 (1978).

Culpable or criminal negligence in this jurisdiction is the equivalent of gross negligence. *Faunteroy v. United States*, App. D.C., 413 A.2d 1294 (1980).

Involuntary manslaughter may occur from carrying pistol without license. — Carrying a pistol without a license exposes the community to such an inherent risk of harm that when death results, even though it is an unintended consequence, the killer may be charged with involuntary manslaughter. *United States v. Walker*, App. D.C., 380 A.2d 1388 (1977).

But driving without license not evidence of gross or criminal negligence. — Fact that defendant was driving without a license did not constitute evidence that he was grossly or criminally negligent. *Hawkins v. United States*, App. D.C., 395 A.2d 45 (1978).

Distinction between murder and manslaughter. — If malice is proved beyond a reasonable doubt and no affirmative defense applies, the killer is guilty of murder; if malice is not proved, he is guilty of manslaughter. *United States v. Alexander*, 471 F.2d 923 (D.C. Cir.), cert. denied, 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494 (1972).

The high degree of recklessness requisite to prove malice as an element of murder is distinguished from the lesser recklessness constituting manslaughter. *United States v. Dent*, 477 F.2d 447 (D.C. Cir. 1973).

Voluntary manslaughter is lesser included offense within second degree murder. *Branch v. United States*, App. D.C., 382 A.2d 1033 (1978).

The subjective frame of mind that is required for imperfect self-defense is identical to that present in true self-defense, and that frame of mind, sufficient to result in an acquittal if objectively reasonable, should be sufficient to meet the mitigation standard required to re-

duce second degree murder to voluntary manslaughter. *Swann v. United States*, App. D.C., 648 A.2d 928 (1994).

Involuntary manslaughter as lesser included offense of second degree murder. — See *Fornah v. United States*, App. D.C., 460 A.2d 556 (1983).

Charge of cruelty to a child does not merge into a manslaughter conviction, had under a count of second degree murder. *United States v. Thomas*, 459 F.2d 1172 (D.C. Cir. 1972).

Inadvertent homicide defense. — One defense to a charge of causing another's death is that the homicide was inadvertent and that any negligence was not sufficient to support a conviction of involuntary manslaughter. *United States v. Alexander*, 471 F.2d 923 (D.C. Cir.), cert. denied, 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494 (1972).

Provocation defense to second degree murder. — Provocation is not an element of manslaughter, whether voluntary or involuntary, but is a defense to second degree murder. *United States v. Alexander*, 471 F.2d 923 (D.C. Cir.), cert. denied, 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494 (1972).

And provocation must be adequate before defendant can be acquitted of second degree murder and convicted instead of manslaughter. *United States v. Alexander*, 471 F.2d 923 (D.C. Cir.), cert. denied, 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494 (1972).

Government is generally not required to disprove provocation in its case in chief, unless its own evidence supports a finding of adequate provocation. *United States v. Alexander*, 471 F.2d 923 (D.C. Cir.), cert. denied, 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494 (1972).

But once evidence introduced, burden of persuasion on government. — Once some evidence of provocation is in the case, whether introduced by the government or the defense, the burden of persuading the jury of the absence of provocation is on the government. *United States v. Alexander*, 471 F.2d 923 (D.C. Cir.), cert. denied, 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494 (1972).

Defendant's prior aggressive behavior admissible where self-defense asserted. — Where a defendant raises a claim of self-defense, evidence of prior aggressive conduct is admissible. *Fornah v. United States*, App. D.C., 460 A.2d 556 (1983).

Once the defendant takes the stand and testifies in his own defense that the decedent had attacked him first, the evidence concerning his physical attack on decedent 10 months earlier has substantial probative value outweighing the prejudice of such evidence and hence the error in admitting this evidence was

harmless. *Fornah v. United States*, App. D.C., 460 A.2d 556 (1983).

One who is blameless is entitled to fall back on the "castle" doctrine, which states that no retreat is required before resorting to the use of deadly force in repelling an attack on one's home. *United States v. Peterson*, 483 F.2d 1222 (D.C. Cir.), cert. denied, 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244 (1973).

But an invitation to provocation may overcome a claim of self-defense. *United States v. Peterson*, 483 F.2d 1222 (D.C. Cir.), cert. denied, 414 U.S. 1007, 94 S. Ct. 367, 38 L. Ed. 2d 244 (1973).

Although finding of guilt not automatic follow disproof of self-defense. — In a prosecution for manslaughter, even though the government proves beyond a reasonable doubt that the defendant did not act in self-defense he does not necessarily have to be found guilty. *Baker v. United States*, App. D.C., 324 A.2d 194 (1974).

Inculpatory statement following request for identification voluntary and admissible. — Where the defendant, before being charged or arrested for any crime, and without interrogation or coercion of any sort, states, in reply to a request for identification, that he killed a person, the statement is voluntarily and admissible. *United States v. Bennett*, 495 F.2d 943 (D.C. Cir. 1974).

Crime must be charged with reasonable particularity as to time, place, and circumstances. *United States v. Geare*, 293 F. 997 (D.C. Cir. 1923).

Language in indictment sufficient to charge involuntary manslaughter. — An indictment which alleges that the accused "feloniously, wantonly and with gross negligence" shot the deceased charges involuntary manslaughter only. *United States v. Pender*, App. D.C., 309 A.2d 492 (1973).

And insufficient. — Where a manslaughter indictment is uncertain concerning the statutory and regulatory requirements which the defendants allegedly failed to comply with, the indictment is bad. *United States v. Interstate Properties*, 153 F.2d 469 (D.C. Cir. 1946).

Duplicitous count improper. — Although a defendant can properly be charged with both voluntary manslaughter and involuntary manslaughter in the same indictment, a duplicitous count is improper. *Murray v. United States*, App. D.C., 358 A.2d 314 (1976).

Misjoinder of defendants where no violations of joint common law duties. — Where the acts of negligence charged are not violations of common law duties jointly owed by the defendants, there is a misjoinder of the defendants under common law principles. *United States v. Interstate Properties*, 153 F.2d 469 (D.C. Cir. 1946).

Government has burden of proof in manslaughter prosecution. — In a prosecution

for manslaughter, the government has the burden of proof beyond a reasonable doubt on all elements of the offense. *Baker v. United States*, App. D.C., 324 A.2d 194 (1974).

And photographs of prior assaults may be relevant. — In a prosecution for murder, photographs taken after prior alleged assaults by the defendant may be relevant to intent. *United States v. Marcey*, 440 F.2d 281 (D.C. Cir. 1971).

And certificate of unregistered pistol admissible. — In a homicide prosecution, the court does not commit reversible error in admitting into evidence a certificate stating that the defendant had not registered the pistol used in the homicide. *Gezmu v. United States*, App. D.C., 375 A.2d 520 (1977).

But hearsay cannot provide a factual predicate for consideration of manslaughter. *Bethea v. United States*, App. D.C., 365 A.2d 64 (1976), cert. denied, 433 U.S. 911, 97 S. Ct. 2979, 53 L. Ed. 2d 1095 (1977).

And prosecutor's calling the accused an "executioner" is improper. *United States v. Jones*, 482 F.2d 747 (D.C. Cir. 1973).

Instructions should be given on the element of specific intent. *United States v. Marcey*, 440 F.2d 281 (D.C. Cir. 1971).

Murder charge precedent to instruction concerning reduction to manslaughter. — Instructions concerning the distinction between manslaughter and second degree murder and the factors that will reduce murder to manslaughter are appropriate only where the defendant is charged with second degree murder as well as manslaughter. *United States v. Alexander*, 471 F.2d 923 (D.C. Cir.), cert. denied, 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494 (1972).

And instruction should be given where evidence warrants. — In a prosecution for second degree murder, an instruction on manslaughter should be given where the evidence so warrants. *Pendergrast v. United States*, App. D.C., 332 A.2d 919 (1975).

But defendant not entitled to instruction where malice indisputably present. — Defendant in second degree murder prosecution was not entitled to a jury instruction on manslaughter as a lesser included offense where it was undisputed that the victim had been brutally beaten and thus the jury could not rationally infer the absence of malice, an element essential for murder but not required for manslaughter. *Day v. United States*, App. D.C., 390 A.2d 957 (1978), rev'd on other grounds sub nom. *Graves v. United States*, App. D.C., 490 A.2d 1086 (1984).

Or where no evidence of provocation. — A requested instruction on manslaughter as a lesser included offense of second degree murder may be refused absent an evidentiary predicate for a finding of adequate legal provocation.

Jamison v. United States, App. D.C., 373 A.2d 594 (1977).

Such as shutting door in face. — Shutting a door in one's face does not show sufficient provocation for a manslaughter instruction. *Harris v. United States*, App. D.C., 373 A.2d 590 (1977).

Or delayed reaction over rape. — Passion aroused by a rape is insufficient provocation to justify a manslaughter instruction where the killing of the alleged rapist takes place over an hour after the defendant learned of the rape. *Dean v. United States*, App. D.C., 377 A.2d 423 (1977).

Sample instruction on provocation to be given. — The sample instruction on provocation is to be given where the accused is charged with second degree murder and manslaughter and adequate provocation is put in issue. *United States v. Alexander*, 471 F.2d 923 (D.C. Cir.), cert. denied, 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494 (1972).

Involuntary manslaughter instruction depends on evidence in record. — The question of whether a defendant is entitled to an involuntary manslaughter instruction depends on the existence of at least some evidence in the record fairly tending to bear on the issue of that offense. *Simon v. United States*, 424 F.2d 796 (D.C. Cir. 1970).

Such as reckless conduct. — Evidence of reckless conduct unintentionally resulting in death may form the basis for an involuntary manslaughter instruction. *Simon v. United States*, 424 F.2d 796 (D.C. Cir. 1970).

Conduct not justifying involuntary manslaughter instruction. — Recklessness as to the accuracy of shooting towards a group of men does not justify an involuntary manslaughter instruction where the defendant intended to shoot one of the men. *Simon v. United States*, 424 F.2d 796 (D.C. Cir. 1970).

Failure to instruct on assault absent evidence foundation not error. — In a murder prosecution, a failure to instruct as to assault with a dangerous weapon as a lesser included offense is not error where there is no foundation in the evidence for such a conviction. *United States v. Marcey*, 440 F.2d 281 (D.C. Cir. 1971).

Sufficient instruction on consequences of insanity acquittal. — An instruction as to the consequences of an acquittal by reason of insanity is not insufficient where the court sets forth the legal standard for commitment. *United States v. Marcey*, 440 F.2d 281 (D.C. Cir. 1971).

Court may fail to give limiting instruction on statement showing state of mind. — In a homicide prosecution, the court may fail to give a limiting instruction concerning an extra judicial statement admitted to show the state of mind of the defendant and the victim.

Gezmu v. United States, App. D.C., 375 A.2d 520 (1977).

Deficiencies in instructions not raised below not noticeable on appeal. — The defendant may not complain on appeal of any deficiencies in the instructions given in a manslaughter prosecution where none of the alleged shortcomings were brought to the attention of the lower court by appropriate objection or request. *United States v. Carter*, 420 F.2d 150 (D.C. Cir. 1969), cert. denied, 397 U.S. 1017, 90 S. Ct. 1253, 25 L. Ed. 2d 432 (1970).

Where the defense counsel does not object to the manslaughter instructions given, and where there is no plain error, he cannot on appeal question these instructions. *Carmichael v. United States*, App. D.C., 363 A.2d 302 (1976).

Requested reinstruction on manslaughter uncoercive, absent objection. — A reinstruction on a lesser included offense of involuntary manslaughter, given at the jury's request and in the absence of objection, is not coercive. *Carmichael v. United States*, App. D.C., 363 A.2d 302 (1976).

Jury deliberations should be confined to specific acts of negligence charged in indictment. *Sinclair v. United States*, 265 F. 991 (D.C. Cir. 1920).

Asking undecided jury to come back to consider lesser charge not coercive. — Where it is apparent that the jury has already determined that the facts present a question as to whether the defendant is guilty of second degree murder or manslaughter, asking them to come back on the following day to see if they can reach a verdict on the lesser charge is not coercive. *United States v. Smoot*, 463 F.2d 1221 (D.C. Cir. 1972).

Finding of manslaughter, but not carrying pistol without license, not fatally inconsistent. — Finding a defendant who shot a victim with a pistol guilty of manslaughter and not guilty of carrying a pistol without a license is not fatally inconsistent. *Steadman v. United States*, App. D.C., 358 A.2d 329 (1976).

Consecutive punishments for same act unauthorized. — Congress did not intend to authorize consecutive punishments for an aggravated assault and a manslaughter growing out of same act. *Davenport v. United States*, 353 F.2d 882 (D.C. Cir. 1965).

Improper to enter conviction on remand over defendant's objection. — Where defendant was convicted of second degree murder and the trial court's refusal to give manslaughter instruction was but one of several errors committed, the trial court on remand could not enter a conviction for manslaughter at the government's request where the defendant objected and sought a new trial. *Pendergrast v. United States*, App. D.C., 385 A.2d 173 (1978).

Defendant who invalidates sentence subject to increased punishment. — A defendant who successfully attacks an invalid sentence for manslaughter can be validly resentenced and his punishment increased. *Davenport v. United States*, 353 F.2d 882 (D.C. Cir. 1965).

Evidence sufficient for conviction. — See *Faunteroy v. United States*, App. D.C., 413 A.2d 1294 (1980); *Martinez v. United States*, App. D.C., 566 A.2d 1049 (1989), cert. denied, 498 U.S. 1030, 111 S. Ct. 685, 112 L. Ed. 2d 677 (1991); *Wilkins v. United States*, App. D.C., 582 A.2d 939 (1990); *Doe v. United States*, App. D.C., 583 A.2d 670 (1990); *Comber v. United States*, App. D.C., 584 A.2d 26 (1990); *Coreas v. United States*, App. D.C., 585 A.2d 1376, cert. denied, 502 U.S. 855, 112 S. Ct. 167, 116 L. Ed. 2d 130 (1991); *Gray v. United States*, App. D.C., 589 A.2d 912 (1991).

A conviction on a charge of involuntary manslaughter will be affirmed upon evidence that the defendant operated an automobile while drinking and in a criminally careless manner, and ran over and caused the death of a man. *Story v. United States*, 16 F.2d 342 (D.C. Cir. 1926), cert. denied, 274 U.S. 739, 47 S. Ct. 576, 71 L. Ed. 1318 (1927).

An inebriant atmosphere and heated arguments, followed by a fatal shot in an attempt to break up the arguments, is sufficient evidence to be able to find the defendant guilty of manslaughter. *United States v. Dixon*, 419 F.2d 288 (D.C. Cir. 1969).

In a prosecution for killing, testimony as to blood on the defendant's hands and under his fingernails sustains a conviction for manslaughter. *United States v. Lumpkins*, 439 F.2d 494 (D.C. Cir. 1970).

A beating of a child to impose discipline may be carried to such unreasonable extremes as to involve a "gross deviation" and an extreme risk of harm and death, warranting a conviction for manslaughter. *United States v. Grady*, 481 F.2d 1106 (D.C. Cir. 1973).

Eyewitness testimony of more than 1 person that the defendant shot the victim is sufficient to support a conviction for manslaughter. *Steadman v. United States*, App. D.C., 358 A.2d 329 (1976).

Evidence of victim's violent character to support self-defense claim. — A defendant charged with homicide has the right to present evidence of the victim's violent character to support a claim of self-defense. *Johns v. United States*, App. D.C., 434 A.2d 463 (1981).

Prosecution not permitted to put defendant's character in issue. — Unless a defendant expressly puts her own good character in issue, her introduction of evidence of the deceased victim's violent character to support her claim of self-defense does not permit the prosecution to offer similar evidence about the defendant. *Johns v. United States*, App. D.C., 434 A.2d 463 (1981).

Whether a defendant or some other defense witness testifies about the deceased victim's violent character for its relevance to the "reasonable fear" or "aggressor" aspects of a self-defense claim, the general rule of policy against admission of evidence about the defendant's own character shall prevail, unless, of course, the defendant first places her own good character in issue. *Johns v. United States*, App. D.C., 434 A.2d 463 (1981).

Conviction affirmed. — Conviction, by jury, of involuntary manslaughter was affirmed. *Askew v. United States*, App. D.C., 540 A.2d 760 (1988).

Cited in *Killough v. United States*, 315 F.2d 241 (D.C. Cir. 1962); *Falls v. United States*, 321 F.2d 762 (D.C. Cir. 1963); *Rowe v. United States*, 370 F.2d 240 (D.C. Cir. 1966); *Green v. United States*, App. D.C., 363 A.2d 979 (1976); *In re W.B.W.*, App. D.C., 397 A.2d 143 (1979); *Jones v. United States*, App. D.C., 398 A.2d 11 (1979); *Sellars v. United States*, App. D.C., 401 A.2d 974 (1979); *Burrell v. United States*, App. D.C., 455 A.2d 1373 (1983); *Morris v. United States*, App. D.C., 469 A.2d 432 (1983); *United States v. McRae*, 580 F. Supp. 1560 (D.D.C. 1984); *Allen v. District of Columbia Hacker's License Appeal Bd.*, App. D.C., 471 A.2d 271 (1984); *Logan v. United States*, App. D.C., 483 A.2d 664 (1984); *Barnes v. United States*, App. D.C., 529 A.2d 284 (1987); *Hunter v. United States*, App. D.C., 548 A.2d 806 (1988); *Smith v. United States*, App. D.C., 554 A.2d 1155 (1989); *Allen v. United States*, App. D.C., 603 A.2d 1219, cert. denied, 505 U.S. 1227, 112 S. Ct. 3050, 120 L. Ed. 2d 916 (1992); *United States v. Holt*, 120 WLR 621 (Super. Ct. 1992); *Dailey v. United States*, App. D.C., 611 A.2d 963 (1992); *Johnson v. United States*, App. D.C., 616 A.2d 1216 (1992), cert. denied, 507 U.S. 996, 113 S. Ct. 1611, 123 L. Ed. 2d 172 (1993); *Brown v. United States*, App. D.C., 619 A.2d 1180 (1992); *Carpenter v. United States*, App. D.C., 635 A.2d 1289 (1993); *Cheatle v. Cheatle*, App. D.C., 662 A.2d 1362 (1995).

§ 22-2406. Murder of law enforcement officer.

(a) Whoever, with deliberate and premeditated malice, and with knowledge or reason to know that the victim is a law enforcement officer, kills any Metropolitan Police Officer or any other local, federal, or state law enforcement

officer engaged in, or on account of, the performance of such officer's official duties and such killing results, is guilty of murder of a law enforcement officer, and shall be sentenced to life without parole. It shall not be a defense to this charge that the victim was acting unlawfully by seizing or attempting to seize the defendant or another person.

(b) For purposes of subsection (a) of this section, the term "local law enforcement officer" means the deputy and assistant; the Director, deputy directors, and officers of the District of Columbia Department of Corrections; the Director, members, and officers of the District of Columbia Board of Parole; any probation or pretrial services officer of the District of Columbia; and Metro Transit police officers. For the same purposes, the term "state law enforcement officer" means a state, county, or municipal officer performing functions comparable to those performed by a Metropolitan Police Officer or by a "local law enforcement officer," as that term is defined in this subsection, and includes, but is not limited to, state, county, or municipal police officers, sheriffs, correctional officers, parole officers, and probation and pretrial services officers. (Mar. 3, 1901, 31 Stat. 1321, ch. 854, § 802a, as added May 23, 1995, D.C. Law 10-256, § 2(d), 42 DCR 20.)

Effect of amendments. — D.C. Law 10-256 added this section.

Legislative history of Law 10-256. — See note to § 22-2404.

CHAPTER 25. PERJURY; RELATED OFFENSES.

Sec.

22-2501. [Repealed].

22-2511. Perjury.

22-2512. Subornation of perjury.

Sec.

22-2513. False swearing.

22-2514. False statements.

§ 22-2501. Perjury; subornation of perjury.

Repealed. Dec. 1, 1982, D.C. Law 4-164, § 602(nn), 29 DCR 3976.

Cross references. — As to perjury, see § 22-2511.

As to subornation of perjury, see § 22-2512.

Legislative history of Law 4-164. — Law 4-164, the “District of Columbia Theft and White Collar Crimes Act of 1982,” was introduced in council and assigned Bill No. 4-133, which was referred to the Committee on the

Judiciary. The Bill was adopted on first, amended first and second readings on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.

Cited in *In re Hutchinson*, App. D.C., 534 A.2d 919 (1987).

§ 22-2511. Perjury.

(a) A person commits the offense of perjury if:

(1) Having taken an oath or affirmation before a competent tribunal, officer, or person, in a case in which the law authorized such oath or affirmation to be administered, that he or she will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by that person subscribed is true, wilfully and contrary to an oath or affirmation states or subscribes any material matter which he or she does not believe to be true and which in fact is not true; or

(2) As a notary public or other officer authorized to take proof of certification, wilfully certifies falsely that an instrument was acknowledged by any party thereto or wilfully certifies falsely as to another material matter in an acknowledgement.

(b) Any person convicted of perjury shall be fined not more than \$5,000 or imprisoned for not more than 10 years, or both. (Dec. 1, 1982, D.C. Law 4-164, § 401, 29 DCR 3976.)

Cross references. — As to civil penalty for violation of Medicaid Provider Fraud Prevention Act, see § 3-703.

As to prosecution of violations of Medicaid Provider Fraud Prevention Act, see § 3-704.

As to wilful false swearing before Metropolitan Police or Fire Department trial boards, see § 4-802.

As to wilful false swearing before District of Columbia Civilian Complaint Review Board, see § 4-905.

As to wilful false statement in interrogatories to garnishee, see § 16-552.

As to false affidavit concerning allowance authorized for decedent's family, see § 19-101.

As to offenses and penalties concerning hospitalization of mentally ill, see § 21-591.

As to false statement in application for alcoholic beverage license, see § 25-115.

As to false statement by life insurance companies or agents, see § 35-408.

As to false statements concerning eligibility for nonprofit housing development water and sewer rate deductions, see §§ 43-1522.4 and 43-1605.4.

As to false statements in homestead deduction application, see § 47-850.

As to false statement in application for closing-out sale license, see § 47-2102.

Section references. — This section is referred to in §§ 3-704, 6-2321 and 6-2349.

Legislative history of Law 4-164. — See note to § 22-2501.

Former § 22-2501 cited in *United States v. Hsu*, App. D.C., 439 A.2d 469 (1981).

Cited in *United States v. Rorie*, App. D.C., 518 A.2d 409 (1986); *Oxendine v. Merrell Dow Pharmaceuticals, Inc.*, App. D.C., 563 A.2d 330 (1989), cert. denied, 493 U.S. 1074, 110 S. Ct. 1121, 107 L. Ed. 2d 1028 (1990); *United States*

v. McNeil, 911 F.2d 768 (D.C. Cir. 1990); *Taylor v. United States*, App. D.C., 603 A.2d 451, cert. denied, 506 U.S. 852, 113 S. Ct. 155, 121 L. Ed. 2d 105 (1992).

§ 22-2512. Subornation of perjury.

A person commits the offense of subornation of perjury if that person wilfully procures another to commit perjury. Any person convicted of subornation of perjury shall be fined not more than \$5,000 or imprisoned for not more than 10 years, or both. (Dec. 1, 1982, D.C. Law 4-164, § 402, 29 DCR 3976.)

Legislative history of Law 4-164. — See note to § 22-2501.

“Two-witness” rule, which must be satisfied to prove perjury, also applies to subornation of perjury: The subornation itself, i.e., the wilful procurement of another to commit perjury, may be proved by 1 person’s testimony, but the perjury must still be proved by 2 witnesses, or 1 witness with corroborating evidence. *Jenkins v. United States*, App. D.C., 500 A.2d 1019 (1985).

Construed with § 22-722. — This section deals with a wide variety of statements under oath, and covers a multitude of instances which would not be reached by § 22-722(a)(1), and the latter section likewise covers far more than

attempts to seek false testimony. *Smith v. United States*, App. D.C., 591 A.2d 229 (1991).

Knowledge of false testimony. — To convict of subornation of perjury, it is essential that the person procuring the perjury know or have reason to believe the testimony given would be false and that the witness know that the testimony is false. *Riley v. United States*, App. D.C., 647 A.2d 1165 (1994).

No merger with obstruction of justice. — Because subornation of perjury and obstruction of justice each require proof of an element the other does not, the offenses do not merge, and the trial court is free to impose separate sentences for each. *Riley v. United States*, App. D.C., 647 A.2d 1165 (1994).

§ 22-2513. False swearing.

(a) A person commits the offense of false swearing if under oath or affirmation he or she wilfully makes a false statement, in writing, that is in fact material and the statement is one which is required by law to be sworn or affirmed before a notary public or other person authorized to administer oaths.

(b) Any person convicted of false swearing shall be fined not more than \$2,500 or imprisoned for not more than 3 years, or both. (Dec. 1, 1982, D.C. 4-164, § 403, 29 DCR 3976.)

Cross references. — As to penalties for certain acts in relation to compromises and agreements concerning recordation tax on deeds, see § 45-930.

Legislative history of Law 4-164. — See note to § 22-2501.

§ 22-2514. False statements.

(a) A person commits the offense of making false statements if that person wilfully makes a false statement that is in fact material, in writing, directly or indirectly, to any instrumentality of the District of Columbia government, under circumstances in which the statement could reasonably be expected to be relied upon as true; provided, that the writing indicates that the making of a false statement is punishable by criminal penalties.

(b) Any person convicted of making false statements shall be fined not more than \$1,000 or imprisoned for not more than 180 days, or both. (Dec. 1, 1982,

D.C. Law 4-164, § 404, 29 DCR 3976; Aug. 20, 1994, D.C. Law 10-151, § 113(e), 41 DCR 2608.)

Cross references. — As to falsifying documents and testimony required under Chapter 25 of Title 1, see § 1-2529.

As to penalty for filing application or report pursuant to Chapter 7 of Title 2 containing false statement, see § 2-712.

As to unlawful acts by professional engineers, see § 2-2314.

As to false or misleading filing under Chapter 26 of Title 2, see § 2-2608.

As to prohibited acts concerning practice of veterinary medicine, see § 2-2734.

As to fraud in obtaining public assistance, see subchapter XVIII of Chapter 2 of Title 3.

As to penalties for violation of Medicaid Provider Fraud Prevention Act, see § 3-702.

As to civil penalties for violating Medicaid Provider Fraud Prevention Act, see § 3-703.

As to false reports concerning certain vital statistics, see § 6-225.

As to false claims for compensation for repair of water pipes or sewers, see § 6-405.

As to falsifying information concerning wastewater control, see § 6-954.

As to false information violating firearms control, see § 6-2374.

As to penalties and enforcement of adult protective services, see § 6-2512.

As to verification of writings required by Title 20, see § 20-102.

As to misstatement of fact in instrument delivered pursuant to Chapter 3 of Title 29, see § 29-399.50.

As to misstatement of fact in instrument delivered pursuant to Chapter 5 of Title 29, see § 29-599.11.

As to penalty for failure to provide correct information concerning compulsory school attendance, see § 31-406.

As to false statements concerning tuition required of nonresident attending public school in District, see § 31-603.

As to statements required by beneficial owners, directors, or officers of domestic stock insurance companies, see § 35-213.

As to false statements relating to compulsory no fault motor vehicle insurance, see § 35-2113.

As to penalty for false statement to obtain

workers' compensation benefits or payment, see § 36-333.

As to unlawful acts concerning registration of motor vehicles, see § 40-105.

As to false statements as to liens on motor vehicles, see § 40-1015.

As to false information in statement required by Chapter 11 of Title 40, see § 40-1106.

As to false statement with respect to financing statement or other filing, see § 42-104.

As to penalty for certain acts in relation to compromises and agreements concerning recordation tax on deeds, see § 45-930.

As to penalty for false statements or representations concerning unemployment compensation, see § 46-120.

As to penalty for violation of Chapter 18 of Title 47, see § 47-1813.6.

As to administration and enforcement of provisions relating to qualified lower income homeownership households, see § 47-3504.

As to administration and enforcement of provisions relating to qualifying nonprofit housing organizations, see § 47-3506.

Section references. — This section is referred to in §§ 41-424, 45-922, 47-850, 47-3504, and 47-3506.

Effect of amendments. — D.C. Law 10-151 substituted "180 days" for "1 year" in (b).

Emergency act amendments. — For temporary amendment of section, see § 113(e) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 4-164. — See note to § 22-2501.

Legislative history of Law 10-151. — Law 10-151, the "Omnibus Criminal Justice Reform Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

CHAPTER 26. PRISON BREACH; MISPRISONS.

Sec.

22-2601. Escape from institution or officer.

22-2602. [Repealed].

Sec.

22-2603. Introducing contraband into penal institution.

§ 22-2601. Escape from institution or officer.

(a) No person shall escape or attempt to escape from:

(1) Any penal institution or facility in which that person is confined pursuant to an order issued by a court, judge, or commissioner of the District of Columbia; or

(2) The lawful custody of an officer or employee of the District of Columbia or of the United States.

(b) Any person who violates subsection (a) of this section shall be fined not more than \$5,000 or imprisoned not more than 5 years, or both, said sentence to begin, if the person is an escaped prisoner, upon the expiration of the original sentence. (July 15, 1932, 47 Stat. 698, ch. 492, § 8; June 6, 1940, 54 Stat. 243, ch. 254, § 6(a); July 29, 1970, 84 Stat. 574, Pub. L. 91-358, title I, § 157(b); 1973 Ed., § 22-2601; Aug. 20, 1994, D.C. Law 10-151, § 203, 41 DCR 2608.)

Cross references. — As to additional penalty for committing crime when armed, see §§ 22-3201 and 22-3202.**Section references.** — This section is referred to in § 24-207.**Effect of amendments.** — D.C. Law 10-151 rewrote this section.**Emergency act amendments.** — For temporary amendment of section, see § 203 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).**Legislative history of Law 10-151.** — Law 10-151, the "Omnibus Criminal Justice Reform Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.**Applicability of section to halfway houses and work release programs.** — Where the defendant is released from pretrial custody on personal recognizance and on condition that he live in a halfway house and participate in a work release program, he is not "committed" within the purview of this section. *McMillian v. United States*, App. D.C., 326 A.2d 241 (1974).

A prisoner, who, in course of serving a felony sentence, is transferred to a halfway house, is

guilty of escape from a penal institution when he leaves and does not return. *United States v. Venable*, App. D.C., 316 A.2d 857 (1974).A misdemeanant who is placed in a halfway house for participation in a work release program due to administrative error rather than by court order and who leaves and fails to return is properly prosecuted under this section rather than § 24-465, which prescribes the punishment for violating a work release plan. *Armstead v. United States*, App. D.C., 310 A.2d 255 (1973).Where a prisoner under a work-release program has a legal duty, prescribed by District of Columbia authority, to return to the prison in which he is incarcerated for violating a District of Columbia statute, breach of that duty within the geographic bounds of the District is an escape within the District, even though the prison is without the geographic bounds of the District. *Mundine v. United States*, App. D.C., 431 A.2d 16 (1981).Misdemeanant, who had violated a court ordered work-release program must not be sentenced under this section, but under the more lenient provision of § 24-465(b). *United States v. Payton*, 113 WLR 617 (Super. Ct. 1985).Section 24-465(b) does not establish the exclusive penalty for a work-release misdemeanant's failure to return to a correctional facility, and such a violation is also subject to prosecution under the general prison break statute, this section. *Gonzalez v. United States*, App. D.C., 498 A.2d 1172 (1985).**Section does not apply outside the Dis-**

trict. *Rivers v. United States*, App. D.C., 334 A.2d 179 (1975).

Constitutional to prosecute prisoner in Superior Court. — The prosecution of a prisoner who escaped from custody in the District in the Superior Court, rather than in the District Court, is not a denial of due process or equal protection. *Rivers v. United States*, App. D.C., 334 A.2d 179 (1975).

Statute of limitations. — Violation of this section constitutes a continuing offense. Thus, the statute of limitations under § 23-113(b) did not commence to run until the day after the defendant was returned to custody. *Craig v. United States*, App. D.C., 551 A.2d 440 (1988).

Duress defense. — A prisoner who fails to return to custody after being issued a temporary pass may establish that his failure to return was involuntary and induced by duress. *Stewart v. United States*, App. D.C., 370 A.2d 1374 (1977).

Guilty plea valid despite failure to inform as to consecutive nature of sentence.

— The failure to inform the defendant of the consecutive nature of the sentence before accepting a guilty plea does not constitute “manifest injustice” entitling him to withdraw the plea where the court carefully ascertains that he entered the plea voluntarily and with an understanding of the nature of the charge, there is no dispute as to guilt, and the total time which he is required to serve does not substantially exceed the maximum he is aware he might be required to serve. *Hicks v. United States*, App. D.C., 362 A.2d 111 (1976).

Cited in *Rosser v. United States*, App. D.C., 313 A.2d 876 (1974); *Rindgo v. United States*, App. D.C., 411 A.2d 373 (1980); *Jackson v. United States*, App. D.C., 441 A.2d 1000 (1982); *United States v. Gray*, 115 WLR 265 (Super. Ct. 1987); *In re S.H.*, App. D.C., 570 A.2d 814 (1990).

§ 22-2602. Misprisions by officers or employees of jail.

Repealed. Dec. 1, 1982, D.C. Law 4-164, § 602(o), 29 DCR 3976.

Legislative history of Law 4-164. — Law 4-164, the “District of Columbia Theft and White Collar Crimes Act of 1982,” was introduced in council and assigned Bill No. 4-133, which was referred to the Committee on the Judiciary. The Bill was adopted on first,

amended first and second readings on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.

§ 22-2603. Introducing contraband into penal institution.

Any person, not authorized by law, or by the Mayor of the District of Columbia, or by the Director of the Department of Corrections of the District of Columbia, who introduces or attempts to introduce into or upon the grounds of any penal institution of the District of Columbia, whether located within the District of Columbia or elsewhere, any narcotic drug, weapon, or any other contraband article or thing, or any contraband letter or message intended to be received by an inmate thereof, shall be guilty of a felony, and, upon conviction thereof in the Superior Court of the District of Columbia or in any court of the United States, shall be punished by imprisonment for not more than 10 years. (Dec. 15, 1941, 55 Stat. 800, ch. 572, § 1; June 25, 1948, 62 Stat. 991, ch. 646, § 32(b); May 24, 1949, 63 Stat. 107, ch. 139, § 127; July 29, 1970, 84 Stat. 572, Pub. L. 91-358, title I, § 155(c) (30); 1973 Ed., § 22-2603.)

Change in government. — This section originated at a time when local government powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 401 of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of

the functions of the Board of Commissioners under this section to a single Commissioner. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-211), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and

the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-213(a)), appropriate changes in terminology were made in this section.

Cited in *Smith v. United States*, App. D.C., 586 A.2d 684 (1991).

CHAPTER 27. PROSTITUTION; PANDERING.

Sec.	Sec.
22-2701. Inviting for purposes of prostitution prohibited.	22-2711. Procuring for third persons.
22-2701.1. Definitions.	22-2712. Operating house of prostitution.
22-2702. [Repealed].	22-2713. Premises occupied for lewdness, assignation, or prostitution declared nuisance.
22-2703. Suspension of sentence; conditions; enforcement.	22-2714. Abatement of nuisance under § 22-2713 by injunction — Temporary injunction.
22-2704. Abducting or enticing child from his or her home for purposes of prostitution; harboring such child.	22-2715. Same — Trial; dismissal of complaint; prosecution; costs.
22-2705. Pandering; inducing or compelling an individual to engage in prostitution.	22-2716. Violation of injunction granted under § 22-2714.
22-2706. Compelling an individual to live life of prostitution against his or her will.	22-2717. Order of abatement; sale of property; entry of closed premises punishable as contempt.
22-2707. Procuring; receiving money or other valuable thing for arranging assignation.	22-2718. Disposition of proceeds of sale.
22-2708. Causing spouse to live in prostitution.	22-2719. Bond for abatement; order for delivery of premises; effect of release.
22-2709. Detaining an individual in disorderly house for debt there contracted.	22-2720. Tax for maintaining such nuisance.
22-2710. Procuring for house of prostitution.	22-2721. [Repealed].
	22-2722. Keeping bawdy or disorderly houses.
	22-2723. Property subject to seizure and forfeiture.

§ 22-2701. Inviting for purposes of prostitution prohibited.

(a) It shall not be lawful for any person to invite, entice, persuade, or address for the purpose of inviting, enticing, or persuading, any person or persons in the District of Columbia for the purpose of prostitution or any other immoral or lewd purpose. The penalties for any violation of this section shall be a fine of \$300 for the first offense, a fine of \$300 and 10 days imprisonment for the second offense, and a fine of \$300 and 90 days imprisonment for each subsequent offense. Any person convicted of a violation of this section may be sentenced to community service as an alternative to, but not in addition to, any term of imprisonment authorized by this section.

(b) Inviting, enticing, persuading, or addressing for the purpose of inviting, enticing, or persuading, for the purpose of prostitution includes, but is not limited to, remaining or wandering about a public place and:

(1) Repeatedly beckoning to, stopping, attempting to stop, or attempting to engage passers-by in conversation for the purpose of prostitution;

(2) Stopping or attempting to stop motor vehicles for the purpose of prostitution; or

(3) Repeatedly interfering with the free passage of other persons for the purpose of prostitution. (Aug. 15, 1935, 49 Stat. 651, ch. 546, § 1; June 9, 1948, 62 Stat. 346, ch. 428, title I, § 102; June 29, 1953, 67 Stat. 93, ch. 159, § 202(b); 1973 Ed., § 22-2701; Dec. 10, 1981, D.C. Law 4-57, § 3, 28 DCR 4652; Nov. 21, 1985, D.C. Law 6-62, § 2, 32 DCR 4581; Dec. 1, 1987, D.C. Law 7-44, § 2, 34 DCR 5310.)

Cross references. — As to authority and duty of Chief of Police in regard to houses of prostitution, see §§ 4-145 and 4-146.

As to prosecutions under this section, see § 22-109.

As to transfer or suspension of liquor license pending prosecution, see §§ 25-117 and 25-118.

Section references. — This section is referred to in §§ 22-2703 and 22-3203.

Temporary amendment of section. — Section 2 of D.C. Law 11-77 amended (a) to read as follows:

“(a) It shall not be lawful for any person to invite, entice, persuade, or address for the purpose of inviting, enticing, or persuading, any person or persons in the District of Columbia for the purpose of prostitution or any other immoral or lewd purpose. The penalties for violation of this section shall be a fine of \$500 and no less than 1 day but not more than 90 days imprisonment for the 1st offense, a fine of \$750 and no less than 1 day but not more than 135 days imprisonment for the 2nd offense, and a fine of \$1,000 and no less than 1 day but not more than 180 days imprisonment for the 3rd and each subsequent offense.”

Section 5(b) of D.C. Law 11-77 provided that the act shall expire on the 225th day of its having taken effect or on the effective date of the Safe Streets Anti-Prostitution Act of 1995, whichever occurs first.

Emergency act amendments. — For temporary amendment of section, see § 2 of the Safe Streets Anti-Prostitution Emergency Amendment Act of 1995 (D.C. Act 11-133, August 11, 1995, 42 DCR 4680) and § 2 of the Safe Streets Anti-Prostitution Legislative Review Emergency Amendment Act of 1995 (D.C. Act 11-153, November 9, 1995, 42 DCR 6567).

Legislative history of Law 4-57. — See note to § 22-2701.1.

Legislative history of Law 6-62. — Law 6-62, the “Prostitution Enforcement Amendment Act of 1985,” was introduced in Council and assigned Bill No. 6-261, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on June 25, 1985 and July 9, 1985, respectively. Signed by the Mayor on July 16, 1985, it was assigned Act No. 6-66 and transmitted to both Houses of Congress for its review.

Legislative history of Law 7-44. — Law 7-44, the “Penalty for Prostitution Amendment Act of 1987,” was introduced in Council and assigned Bill No. 7-74, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on June 16, 1987 and June 30, 1987, respectively. Signed by the Mayor on July 23, 1987, it was assigned Act No. 7-59 and transmitted to both Houses of Congress for its review.

Legislative history of Law 11-77. — Law 11-77, the “Safe Streets Anti-Prostitution Tem-

porary Amendment Act of 1995”, was introduced in Council and assigned Bill No. 11-422. The Bill was adopted on first and second readings on July 29, 1995, and October 10, 1995, respectively. Signed by the Mayor on October 26, 1995, it was assigned Act No. 11-147 and transmitted to both Houses of Congress for its review. D.C. Law 11-77 became effective on January 24, 1996.

Section constitutional. — Charges of sexual solicitation are constitutional. *United States v. Kenyon*, App. D.C., 354 A.2d 861 (1976).

This section is within the domain of state power and does not offend the First Amendment. *Riley v. United States*, App. D.C., 298 A.2d 228 (1972), cert. denied, 414 U.S. 840, 94 S. Ct. 96, 38 L. Ed. 2d 77 (1973).

This section deals not with speech protected by the First Amendment. *United States v. Moses*, App. D.C., 339 A.2d 46 (1975), cert. denied, 426 U.S. 920, 96 S. Ct. 2624, 49 L. Ed. 2d 373 (1976).

This section is not unconstitutional under the Fifth Amendment. *Hawkins v. United States*, App. D.C., 105 A.2d 250 (1954).

This section is not void for vagueness. *Riley v. United States*, App. D.C., 298 A.2d 228 (1972), cert. denied, 414 U.S. 840, 94 S. Ct. 96, 38 L. Ed. 2d 77 (1973).

This section does not violate the constitutional guarantee of equal protection. *United States v. Cozart*, App. D.C., 321 A.2d 342 (1974).

Females are not denied the equal protection of the law by this section, which is sex-neutral. *United States v. Moses*, App. D.C., 339 A.2d 46 (1975), cert. denied, 426 U.S. 920, 96 S. Ct. 2624, 49 L. Ed. 2d 373 (1976).

In absence of any showing that a policy requiring corroboration in prosecutions involving homosexual conduct, while not requiring such corroboration in prosecutions for solicitation for prostitution, is based on the distinction between the sex of the defendants, this policy does not result in unconstitutional sex discrimination. *Garrett v. United States*, App. D.C., 339 A.2d 372 (1975).

This section, as applied to persons accused of public solicitations of strangers for sodomy, does not impinge upon any personal rights that can be deemed fundamental or implicit in the concept of ordered liberty. *United States v. Carson*, App. D.C., 319 A.2d 329 (1974).

This section does not violate the right of privacy. *United States v. Dumas*, App. D.C., 327 A.2d 826 (1974).

The proscription of solicitation for the purpose of prostitution does not constitute an unconstitutional invasion of the right of privacy of those who are arrested in some public place. *United States v. Moses*, App. D.C., 339 A.2d 46

(1975), cert. denied, 426 U.S. 920, 96 S. Ct. 2624, 49 L. Ed. 2d 373 (1976).

This section is not unconstitutional as being vague or overly broad. *Eissa v. United States*, App. D.C., 485 A.2d 610 (1984), cert. denied, 474 U.S. 1013, 106 S. Ct. 544, 88 L. Ed. 2d 474 (1985).

This section, as amended in 1981, requiring that conduct be for the purpose of prostitution and providing that objective criteria must be present in order to support a conviction, is not void for vagueness. *Ford v. United States*, App. D.C., 498 A.2d 1135 (1985).

Soliciting for the purpose of prostitution is not entitled to First Amendment protection. *Wood v. United States*, App. D.C., 498 A.2d 1140 (1985).

Even if sexual solicitation did not involve unlawful activity so that it might arguably be protected by the First Amendment, this section is constitutional because it directly advances a substantial governmental interest and is narrowly tailored to serve that interest. *Wood v. United States*, App. D.C., 498 A.2d 1140 (1985).

Due process requires proof by objective criteria. — Amended section requires proof by “objective criteria” that the defendant had a purpose to engage in “sexual acts or contacts with another person in return for a fee”; anything less would not satisfy the requirements of due process. *Ford v. United States*, App. D.C., 533 A.2d 617 (1987).

Section does not apply to soliciting for lewd or immoral purposes. — The 1985 amendment authorizes conviction of soliciting for prostitution upon proof of a combination of otherwise innocent actions; by its plain terms, it does not apply to soliciting for lewd or immoral purposes. *Rose v. United States*, App. D.C., 535 A.2d 849 (1987).

Construed with § 22-2703 and § 16-710.

— This section, when read alone, appears plainly to require a penalty of a \$300 fine for first offenders; it cannot be read alone, however, for D.C. Code § 22-2703 (1981) also applies to penalties for solicitation. Further, § 16-710 permits the court “in criminal cases” to suspend imposition or execution of sentence, or any part thereof, and place a defendant on probation. Both of these statutes have been held to authorize the trial court to grant probation upon conviction of solicitation. *United States v. Williams*, 116 WLR 1005 (Super. Ct. 1988).

Elements of crime. — The government is required to prove beyond a reasonable doubt four elements of the crime: That each appellant (1) invited, enticed, or persuaded (or addressed for the purpose of inviting, enticing, or persuading) (2) a person of age 16 or over (3) for the purpose of engaging, agreeing to engage, or offering to engage in sexual acts or contacts with that person (4) in return for a fee. *Graves*

v. United States, App. D.C., 515 A.2d 1136 (1986).

Exchange need not be verbal and proof of particular language is not necessary to establish the offense; however, there must at least be some evidence of a communication, verbal or nonverbal, between the defendant and the other person and some proof that the contents of that communication is within the proscription of this section. *Ford v. United States*, App. D.C., 533 A.2d 617 (1987).

Being in the “wrong” place, wearing the “wrong” clothing, and acting in a manner which might be consistent with a desire to engage in sexual activity cannot form the basis for a conviction for solicitation for lewd and immoral purposes. *Rose v. United States*, App. D.C., 535 A.2d 849 (1987).

The 1981 amendment did not change the elements of the offense proscribed by this section, nor did it increase or decrease the government’s burden of proof. *Ford v. United States*, App. D.C., 533 A.2d 617 (1987).

Before a defendant may be convicted of solicitation for immoral or lewd purposes, the government must present evidence from which a reasonable trier-of-fact could conclude beyond a reasonable doubt that the defendant had engaged in the prohibited activity for the purpose of committing sodomy. *Rose v. United States*, App. D.C., 535 A.2d 849 (1987).

Actual ability to pay is not an element of the crime of soliciting prostitution. The crime is completed by agreeing to engage or offering to engage in sex for money or other material gain, and does not require proof of the additional fact that one can actually produce the agreed-upon payment. *Nche v. United States*, App. D.C., 526 A.2d 23 (1987).

Commercial nature of transaction. — The term “fee” refers to payment in return for professional services rendered. The offer to exchange a gold necklace for a date with the undercover police officer illustrates the commercial nature of the proposed exchange. Although no money was involved in the suggested bargain, this transaction is precisely the type of purely commercial exchange of sexual acts for a fee that is encompassed by the definition of prostitution. *Muse v. United States*, App. D.C., 522 A.2d 888 (1987).

Evidence was insufficient to sustain conviction where proof of a crucial element of the offense, viz., that defendant offered or agreed to engage in a sexual act “in return for a fee,” was not included, as the section requires. *Ford v. United States*, App. D.C., 533 A.2d 617 (1987).

There is no fundamental right to privacy for commercial sexual solicitation.

Constitutional right to privacy protecting certain intimate conduct does not extend to advertised commercial sexual solicitation per-

formed inside a private residence. *Blyther v. United States*, App. D.C., 577 A.2d 1154 (1990).

This section applies to commercial solicitation in a private residence. *United States v. Jones*, 909 F.2d 533 (D.C. Cir. 1990); *Blyther v. United States*, App. D.C., 577 A.2d 1154 (1990).

Violation of this section does not turn on who broaches commercial nature of transaction. *Lutz v. United States*, App. D.C., 434 A.2d 442 (1981).

Violation of the "immoral or lewd purpose" clause of this section may, but need not, involve a commercial rather than voluntary solicitation for sodomy. *Lutz v. United States*, App. D.C., 434 A.2d 442 (1981).

Section 22-1112(a) and this section overlap in prohibiting invitations to sodomy. *Lutz v. United States*, App. D.C., 434 A.2d 442 (1981).

This section is not limited by its terms to public solicitations. *Lutz v. United States*, App. D.C., 434 A.2d 442 (1981).

Section applies to solicitation for homosexual acts. *Harris v. United States*, App. D.C., 293 A.2d 851 (1972), rev'd on other grounds, App. D.C., 315 A.2d 569 (1974).

Section may be construed as proscribing solicitations for sodomy. *Riley v. United States*, App. D.C., 298 A.2d 228 (1972), cert. denied, 414 U.S. 840, 94 S. Ct. 96, 38 L. Ed. 2d 77 (1973).

The offense of soliciting for lewd and immoral purposes has been limited by judicial construction to solicitation for acts of sodomy. *United States v. Miqueli*, App. D.C., 349 A.2d 472 (1975).

It is not necessary to prove any particular language or conduct to establish that a defendant solicited prostitution. *Curran v. United States*, App. D.C., 52 A.2d 121 (1947).

Proof of particular language or conduct is not necessary to establish the offense of enticing or addressing for the purpose of inviting, enticing or persuading anyone for the purpose of prostitution. *Dinkins v. United States*, App. D.C., 374 A.2d 292 (1977).

And proof of specific offer to perform sex act is not an element of the offense of solicitation for prostitution. *United States v. Smith*, App. D.C., 330 A.2d 759 (1975).

Speech not constituting "solicitation." — Asking someone if he "wants a date" does not necessarily include prostitution. *Williams v. United States*, 110 F.2d 554 (D.C. Cir. 1940).

The question "You want to go out for a while?" is not a "solicitation." *Shannon v. United States*, App. D.C., 311 A.2d 501 (1973), rev'd on other grounds, App. D.C., 319 A.2d 135 (1974).

An affirmative response to an inquiry made by a police officer as to a submission to rectal sodomy does not constitute a "solicitation." *Shannon v. United States*, App. D.C., 311 A.2d 501

(1973), rev'd on other grounds, App. D.C., 319 A.2d 135 (1974).

Transportation of woman within District may violate federal prostitution provisions. — The transportation of a woman wholly within the District with the intent or purpose to induce or entice the woman transported to practice prostitution violates the Mann Act (18 U.S.C. § 2421). *United States v. Beach*, 324 U.S. 193, 65 S. Ct. 602, 89 L. Ed. 865 (1945).

And the Mann Act, (18 U.S.C. § 2421), does not conflict with any other applicable legislation. *United States v. Beach*, 324 U.S. 193, 65 S. Ct. 602, 89 L. Ed. 865 (1945).

Question of transportation for prostitution purposes for Congress to decide. — Whether the District is already adequately protected from the evils of prostitution without the added prohibition of transportation for that purpose is for Congress, not the courts, to decide. *United States v. Beach*, 324 U.S. 193, 65 S. Ct. 602, 89 L. Ed. 865 (1945).

Entrapment defense available. — In a prosecution for soliciting for purposes of prostitution, the defense of entrapment may be available. *Willis v. United States*, App. D.C., 198 A.2d 751 (1964); *Wajer v. United States*, App. D.C., 222 A.2d 68 (1966).

Enforcement of this section must be with the design to prevent the offense, and it must not foster conditions or practices which make it easy and encourage the offense. *Kelly v. United States*, 194 F.2d 150 (D.C. Cir. 1952).

Use of women decoys in prostitution cases is not inappropriate since the decision to adopt a particular method of law enforcement is normally left to the police and will be upheld unless there has been some form of invidious discrimination. *Eissa v. United States*, App. D.C., 485 A.2d 610 (1984), cert. denied, 474 U.S. 1013, 106 S. Ct. 544, 88 L. Ed. 2d 474 (1985).

Court may dismiss an indictment where there is discriminatory enforcement of this section. *United States v. Cozart*, App. D.C., 321 A.2d 342 (1974); *United States v. Moses*, App. D.C., 339 A.2d 46 (1975), cert. denied, 426 U.S. 920, 96 S. Ct. 2624, 49 L. Ed. 2d 373 (1976).

Prosecution by United States Attorney. — A prosecution for a violation of this section should be conducted by the United States Attorney in the name of and for the benefit of the United States. *United States v. Strothers*, 228 F.2d 34 (D.C. Cir. 1955).

Government can charge and prove both prohibited acts in conjunctive. — Since this section proscribes 2 types of sexual solicitation in the disjunctive, i.e., solicitation for prostitution or solicitation for an immoral and lewd purpose, an information or indictment can charge both of the prohibited acts in the conjunctive and the government can proceed to

prove any one or more of the acts. *United States v. Miqueli*, App. D.C., 349 A.2d 472 (1975).

Both parties involved in a subsection (a) violation can be convicted of solicitation for lewd or immoral purposes. *Thompson v. United States*, App. D.C., 618 A.2d 110 (1992).

Place of action must be charged. — An information that does not charge that the defendant acted in any place provided in this section charges no crime. *Williams v. United States*, 110 F.2d 554 (D.C. Cir. 1940).

Refusal to grant jury trial error. — A refusal to grant a motion for a trial by jury for a charge of soliciting prostitution is an error. *Blackburn v. United States*, 84 F.2d 269 (D.C. Cir. 1936).

No right to jury trial. — The act of prostitution is not an offense indictable at common law, so as to entitle a person accused thereof to a trial by jury under the Constitution of the United States. *Bailey v. United States*, 98 F.2d 306 (D.C. Cir. 1938).

A defendant charged with solicitation for the immoral and lewd purpose of committing oral sodomy is not entitled to a jury trial. *Gaithor v. United States*, App. D.C., 251 A.2d 644 (1969).

The defendant has neither a statutory nor a constitutional right to a jury trial on the charge of soliciting for the purpose of prostitution. *Austin v. United States*, App. D.C., 299 A.2d 545 (1973).

One charged with soliciting for the purpose of prostitution is not entitled to a jury trial. *Marshall v. United States*, App. D.C., 302 A.2d 746 (1973).

But accused afforded same protection. — In a prosecution brought to court without a jury, the court must afford the accused the protection he would have been afforded by a properly instructed jury. *King v. United States*, App. D.C., 90 A.2d 229 (1952).

Refusal to issue compulsory process not error. — It is not error to refuse to issue for the defendant a compulsory process for obtaining witnesses. *Kelly v. United States*, App. D.C., 73 A.2d 232 (1950), *rev'd* on other grounds, 194 F.2d 150 (D.C. Cir. 1952).

Higher standard of proof not required for putative customer. — A higher standard of proof is not required when the person charged with sexual solicitation is a putative customer of a prostitute rather than the prostitute herself. *Eissa v. United States*, App. D.C., 485 A.2d 610 (1984), *cert. denied*, 474 U.S. 1013, 106 S. Ct. 544, 88 L. Ed. 2d 474 (1985).

In prosecution for soliciting for prostitution, arresting officer's testimony need not be corroborated. *Wajer v. United States*, App. D.C., 222 A.2d 68 (1966).

Neither does testimony of person solicited. — In a prosecution for soliciting for the purpose of prostitution, it is not necessary that the testimony of the person solicited be corrob-

orated. *Parker v. United States*, App. D.C., 143 A.2d 98 (1958).

Nor that of prosecution witness. — Corroboration of the testimony of a witness for the prosecution is not required in a case of solicitation for prostitution. *Price v. United States*, App. D.C., 135 A.2d 854 (1957).

Corroboration required in homosexual solicitation cases. — It is not a denial of equal protection to require corroboration in cases of homosexual solicitation but not in cases of heterosexual solicitation. *Eissa v. United States*, App. D.C., 485 A.2d 610 (1984), *cert. denied*, 474 U.S. 1013, 106 S. Ct. 544, 88 L. Ed. 2d 474 (1985), *but see*, *Moore v. United States*, App. D.C., 609 A.2d 1133 (1992).

Corroboration not required in homosexual prostitution cases. — Corroboration is not required to prove solicitation for the purpose of homosexual prostitution. *Moore v. United States*, App. D.C., 609 A.2d 1133 (1992).

Uncorroborated testimony supports conviction for soliciting for lewd and immoral purpose. — A conviction of soliciting for a lewd and immoral purpose may be based on the uncorroborated testimony of a single government witness. *Brenke v. United States*, App. D.C., 78 A.2d 677 (1951).

Corroboration requirement. — In prosecution for the solicitation of a covert police officer who stopped his car and was approached by the defendant, corroboration of the officer's testimony was required. *Griffin v. United States*, App. D.C., 396 A.2d 211 (1978), *but see*, *Gary v. United States*, App. D.C., 499 A.2d 815 (1985), *cert. denied*, *sub nom.* *Cole v. United States*, 475 U.S. 1086, 106 S. Ct. 1470, 89 L. Ed. 725, *cert. denied*, 477 U.S. 906, 106 S. Ct. 3279, 91 L. Ed. 2d 568 (1986), and *Moore v. United States*, App. D.C., 609 A.2d 1133 (1992).

Decision in Arnold v. United States, App. D.C., 358 A.2d 335 (1976), abrogating the rule that a rape victim's testimony must be corroborated, did not overturn the need for corroboration in prosecution for solicitation for lewd and immoral purposes. *Griffin v. United States*, App. D.C., 396 A.2d 211 (1978), *but see*, *Gary v. United States*, App. D.C., 499 A.2d 815 (1985), *cert. denied*, *sub nom.* *Cole v. United States*, 475 U.S. 1086, 106 S. Ct. 1470, 89 L. Ed. 725, *cert. denied*, 477 U.S. 906, 106 S. Ct. 3279, 91 L. Ed. 2d 568 (1986), and *Moore v. United States*, App. D.C., 609 A.2d 1133 (1992).

Testimony asserting sodomy or invitation to sodomy must be subjected to careful scrutiny. *Kelly v. United States*, 194 F.2d 150 (D.C. Cir. 1952).

As is testimony of arresting officer for nonviolent sexual assault. — Great caution should be applied in considering the testimony of the arresting officer in cases where the alleged assault is a nonviolent sexual touching which leaves no traces and to which there are

no other witnesses. *Guarro v. United States*, 237 F.2d 578 (D.C. Cir. 1956).

Where conflicting testimony, question of solicitation for court or jury. — Where there is conflicting testimony, the question of whether the defendant or the arresting officer made the solicitation is for the court or the jury to decide. *Bicksler v. United States*, App. D.C., 90 A.2d 233 (1952); *Wajer v. United States*, App. D.C., 222 A.2d 68 (1966).

Age of person solicited can be inferred by personal observation. — The lack of testimony as to the age of the person allegedly solicited by the defendant does not entitle her to acquittal where the person is in court and his age can be inferred by personal observation. *Cunningham v. United States*, App. D.C., 86 A.2d 918 (1952).

Prior record for soliciting prostitution does not forfeit the right to equal protection, but it did affect the credibility of the defendant's testimony. *Hamilton v. United States*, App. D.C., 31 A.2d 887 (1943), rev'd on other grounds, 140 F.2d 679 (D.C. Cir. 1944).

Prosecution not entitled to impeach murder defendant by prior solicitation convictions. — The prosecution is not entitled to attempt to impeach the testimony of a defendant indicted for second-degree murder by referring to prior convictions of soliciting prostitution. *Pinkney v. United States*, 363 F.2d 696 (D.C. Cir. 1966).

Reopening of prosecution within court's discretion. — The reopening of the prosecution, after both the government and the defense have rested and final argument has commenced, to receive corroborating testimony as to the defendant's presence at the time and place of the alleged offense, is within the sound discretion of the court. *Price v. United States*, App. D.C., 135 A.2d 854 (1957).

Evidence of prior convictions. — Substantive evidentiary use of appellant's prior convictions, is subject to two threshold determinations in order to assess the probativeness and relevance of a prior incident: (1) Was an issue raised on which other crimes evidence could be received; and (2) was the proffered evidence relevant to that issue. Whether an issue has been raised for purposes of receiving other crimes evidence depends upon both [a] the elements of the offense charged and [b] the defenses presented. *Graves v. United States*, App. D.C., 515 A.2d 1136 (1986).

The government may not introduce prior acts of inviting for purposes of prostitution into its case-in-chief in order to help establish the intent of a person accused of that same crime. *Graves v. United States*, App. D.C., 515 A.2d 1136 (1986).

Evidence of prior convictions for prostitution is not admissible when motive is at issue in an

action charging sexual solicitation. *Graves v. United States*, App. D.C., 515 A.2d 1136 (1986).

Expert testimony. — Expert testimony is not inadmissible in all solicitation cases. *Ford v. United States*, App. D.C., 533 A.2d 617 (1987).

Evidence sufficient to sustain conviction. — Evidence as to a provocative position, physical blandishment, challenging verbal invitation, prompt discussion of financial terms, and a ready arrangement for a room, sustains a conviction of soliciting prostitution. *Hall v. United States*, App. D.C., 34 A.2d 631 (1943).

The court can find the defendant guilty of soliciting for lewd and immoral purpose on the uncontradicted testimony of the arresting officer, which is corroborated by the testimony of another officer, where there is no evidence introduced of the defendant's good character. *Berneau v. United States*, App. D.C., 188 A.2d 301 (1963).

Defendant was properly convicted of solicitation for lewd or immoral purposes, regardless of whether his participation in a conversation with a prostitute was initiatory or responsive, because even if responsive, his participation in the conversation ripened into "inviting, enticing, persuading, or addressing" for lewd or immoral purposes. *Thompson v. United States*, App. D.C., 618 A.2d 110 (1992).

Section does not deprive the court of the power to suspend the imposition or execution of sentence. *United States v. Williams*, 116 WLR 1005 (Super. Ct. 1988).

Sentence may be imposed upon the failure to pay the fine imposed in addition to the maximum imprisonment authorized as punishment. *Henderson v. United States*, App. D.C., 189 A.2d 132 (1963).

State no right to appeal where evidence insufficient. — Where the judgment is that the evidence failed to sustain the offense charged, the state has no right to appeal. *Korol v. United States*, App. D.C., 82 A.2d 129 (1951).

Indigent defendant entitled to counsel on appeal where penalty less than \$50. — Where the penalty imposed is less than \$50, an indigent defendant is entitled to the aid of counsel in preparing an application for leave to appeal. *Wildeblood v. United States*, 273 F.2d 73 (D.C. Cir. 1959).

Court was limited to sentencing defendant as a first offender because the government had not filed enhancement papers. *United States v. Williams*, 116 WLR 1005 (Super. Ct. 1988).

Review unnecessary for proper concurrent sentence. — The review of an unrelated conviction is not necessary where the sentence is ordered to run concurrently with a proper sentence for soliciting for lewd and immoral purposes. *Willis v. United States*, App. D.C., 198 A.2d 751 (1964).

Decision supported by substantial evidence conclusive on appeal. — In a prosecution for soliciting prostitution, conflicting evidence raises a question for the judge, whose decision is conclusive on appeal where supported by substantial evidence. *Curran v. United States*, App. D.C., 52 A.2d 121 (1947).

Cited in *Bicksler v. United States*, App. D.C., 90 A.2d 233 (1952); *Golden v. United States*, App. D.C., 167 A.2d 796 (1961); *Alexander v. United States*, App. D.C., 187 A.2d 901 (1963); *United States v. Foster*, App. D.C., 226 A.2d 164 (1967); *Angarano v. United States*, App. D.C.,

312 A.2d 295 (1973); *United States v. Lester*, App. D.C., 318 A.2d 899 (1974); *United States v. Wilson*, App. D.C., 342 A.2d 27 (1975); *Williams v. United States*, App. D.C., 342 A.2d 367 (1975); *Simmons v. United States*, App. D.C., 461 A.2d 463 (1983); *United States v. Duncan*, 115 WLR 2517 (Super. Ct. 1987); *Turman v. United States*, App. D.C., 555 A.2d 1037 (1989); *Speight v. United States*, App. D.C., 558 A.2d 357 (1989); *United States v. Kennedy*, 118 WLR 873 (Super. Ct. 1990); *Fedorov v. United States*, App. D.C., 600 A.2d 370 (1991); *Bratcher v. United States*, App. D.C., 604 A.2d 858 (1992).

§ 22-2701.1. Definitions.

For the purposes of this act, the term:

(1) "Prostitution" means the engaging, agreeing to engage, or offering to engage in sexual acts or contacts with another person in return for a fee.

(2) "Public place" means any street, sidewalk, bridge, alley, plaza, park, driveway, parking lot, transportation facility, or the doorways and entrance ways to any building which fronts on any of these locations, or a motor vehicle in or on any such place.

(3) "Arranging for prostitution" means any act to procure or attempt to procure or otherwise arrange for the purpose of prostitution, regardless of whether such procurement or arrangement occurred or a fee was paid.

(4) "Solicitation for prostitution" means inviting, enticing, persuading, or addressing for the purpose of inviting, enticing, or persuading another to engage in acts including, but not limited to, remaining or wandering about a public place; and

(i) Repeatedly beckoning to, stopping, attempting to stop, or attempting to engage passers-by in conversation for the purpose of prostitution;

(ii) Stopping or attempting to stop motor vehicles for the purpose of prostitution; or

(iii) Repeatedly interfering with the free passage of other persons for the purpose of prostitution. (Dec. 10, 1981, D.C. Law 4-57, § 2(1), (2), 28 DCR 4652; May 7, 1993, D.C. Law 9-267, § 3, 39 DCR 5684.)

Section references. — This section is referred to in § 16-2301.

Legislative history of Law 4-57. — Law 4-57, the "Community Park West Designation Act of 1981," was introduced in Council and assigned Bill No. 4-184, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on September 15, 1981, and September 29, 1981, respectively. Signed by the Mayor on October 19, 1981, it was assigned Act No. 4-98 and transmitted to both Houses of Congress for its review.

Legislative history of Law 9-267. — See note to § 22-2723.

References in text. — "This act", referred

to in the introductory language, is D.C. Law 4-57.

Prostitution. — The actual ability to pay is not an element of the crime of soliciting prostitution. The crime is completed by agreeing to engage or offering to engage in sex for money or other material gain, and does not require proof of the additional fact that one can actually produce the agreed-upon payment. *Nche v. United States*, App. D.C., 526 A.2d 23 (1987).

"Fee" construed. — The term "fee" refers to payment in return for professional services rendered. The offer to exchange a gold necklace for a date with the undercover police officer illustrates the commercial nature of the proposed exchange. Although no money was involved in the suggested bargain, this transac-

tion is precisely the type of purely commercial exchange of sexual acts for a fee that is encompassed by the definition of prostitution. *Muse v. United States*, App. D.C., 522 A.2d 888 (1987).

Cited in *Ford v. United States*, App. D.C., 498 A.2d 1135 (1985); *Graves v. United States*, App. D.C., 515 A.2d 1136 (1986); *Ford v. United States*, App. D.C., 533 A.2d 617 (1987).

§ 22-2702. Inmate or frequenter of house of ill fame.

Repealed. Dec. 17, 1941, 55 Stat. 810, ch. 589, § 5.

§ 22-2703. Suspension of sentence; conditions; enforcement.

The court may impose conditions upon any person found guilty under § 22-2701, and so long as such person shall comply therewith to the satisfaction of the court the imposition or execution of sentence may be suspended for such period as the court may direct; and the court may at or before the expiration of such period remand such sentence or cause it to be executed. Conditions thus imposed by the court may include submission to medical and mental examination, diagnosis, and treatment by proper public health and welfare authorities, and such other terms and conditions as the court may deem best for the protection of the community and the punishment, control, and rehabilitation of the defendant. The Department of Human Services of the District of Columbia, the Women's Bureau of the Police Department, and the probation officers of the court are authorized and directed to perform such duties as may be directed by the court in effectuating compliance with the conditions so imposed upon any defendant. (Aug. 15, 1935, 49 Stat. 651, ch. 546, § 3; Aug. 1, 1950, 64 Stat. 393, ch. 513, § 1; 1973 Ed., § 22-2703.)

Office of Director of Public Health abolished. — Section 1 of the Act of August 1, 1950, 64 Stat. 393, ch. 513, provided that the Health Officer of the District of Columbia would be known as the Director of Public Health. The Health Department of the District of Columbia, including the office of the head thereof, was abolished and the functions thereof transferred to the Board of Commissioners of the District of Columbia by Reorganization Plan No. 5 of 1952. Reorganization Order No. 57 of the Board of Commissioners, dated June 30, 1953, and Reorganization Order No. 52, dated June 30, 1953, combined and redesignated Organization Order No. 141, dated February 11, 1964, established under the direction and control of a Commissioner, a Department of Public Health headed by a Director, for the purpose of planning, implementing, and directing public health and hospital care programs, and for performing certain other allied medical and paramedical functions. The Anatomical Board was established under the direction and control of the Director of Public Health consisting of members as prescribed in the D. C. Code. The Order prior to redesignation abolished the previously existing Health Department, Gallinger Hospital, Glenn Dale Sanatorium, and the An-

atomical Board, and transferred their functions and positions to the new department. The organization of the new Department was set out in the Order. The executive functions of the Board of Commissioners were transferred to the Commissioner of the District of Columbia by § 401 of Reorganization Plan No. 3 of 1967. Functions stated in Organization Order No. 141 were transferred to the Director of the Department of Human Resources by Commissioner's Order No. 69-96, dated March 7, 1969, as amended by Commissioner's Order No. 70-83, dated March 6, 1970. The Department of Human Resources was replaced by Reorganization Plan No. 2 of 1979, dated February 21, 1980, which Plan established the Department of Human Services.

Split sentence. — Split sentence, unaccompanied by conditions and an order of probation, was authorized under § 16-710, but was not authorized by this section; this section controls and sentence was, therefore, not authorized. *United States v. Williams*, 116 WLR 1005 (Super. Ct. 1988).

Construed with § 22-2701 and § 16-710. — Section 22-2701, when read alone, appears plainly to require a penalty of a \$300 fine for first offenders; it cannot be read alone, however,

for this section also applies to penalties for solicitation. Further, § 16-710 permits the court "in criminal cases" to suspend imposition or execution of sentence, or any part thereof, and place a defendant on probation. Both of these statutes have been held to authorize the trial court to grant probation upon conviction of solicitation. *United States v. Williams*, 116 WLR 1005 (Super. Ct. 1988).

Probation decisions left to broad sentencing discretion of trial court. — Under

both § 16-710 and this section, the decision to grant or deny probation, as well as the term of probation ordered, is within the broad sentencing discretion of the trial court. *Simmons v. United States*, App. D.C., 461 A.2d 463 (1983).

No abuse of discretion found. — A trial court did not abuse its discretion in imposing a 3-year term of probation. *Simmons v. United States*, App. D.C., 461 A.2d 463 (1983).

Cited in *Bratcher v. United States*, App. D.C., 604 A.2d 858 (1992).

§ 22-2704. Abducting or enticing child from his or her home for purposes of prostitution; harboring such child.

Any person who, for purposes of prostitution, persuades, entices, or forcibly abducts a child under 16 years of age from his or her home or usual abode, or from the custody and control of the child's parents or guardian, shall be punished by imprisonment for not less than 2 years and not more than 20 years; and whoever knowingly secretes or harbors any child so persuaded, enticed, or abducted shall be punished by imprisonment for not more than 8 years. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 813; 1973 Ed., § 22-2704; May 21, 1994, D.C. Law 10-119, § 2(q), 41 DCR 1639.)

Cross references. — As to additional penalty for committing crime when armed, see §§ 22-3201 and 22-3202.

As to exception of child witness' testimony from corroboration requirement, see § 23-114.

Effect of amendments. — D.C. Law 10-119 rewrote this section.

Legislative history of Law 10-119. — Law 10-119, the "Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of

1994," was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

§ 22-2705. Pandering; inducing or compelling an individual to engage in prostitution.

Any person who, within the District of Columbia shall place or cause, induce, procure, or compel the placing of any individual in the charge or custody of any other person, or in a house of prostitution, with intent that such individual shall engage in prostitution, or who shall compel, induce, entice, or procure or attempt to compel, induce, entice, or procure any individual to reside with any other person for immoral purposes or for the purpose of prostitution, or who shall compel, induce, entice, or procure or attempt to compel, induce, entice, or procure any such individual to reside or continue to reside in a house of prostitution, or compel, induce, entice, or procure or attempt to compel, induce, entice, or procure such individual to engage in prostitution, or who takes or detains an individual against the individual's will, with intent to compel such individual by force, threats, menace, or duress to marry the abductor or to marry any other person; or any parent, guardian, or other person having legal custody of the person of an individual, who consents to the individual's taking

or detention by any person, for the purpose of prostitution or sexual intercourse, shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and by a fine of not more than \$1,000. (June 25, 1910, 36 Stat. 833; Jan. 3, 1941, 54 Stat. 1225, ch. 936, § 1; 1973 Ed., § 22-2705; May 21, 1994, D.C. Law 10-119, § 12(a), 41 DCR 1639; _____, 1996, D.C. Law 11- (Act 11-198) § 3, 43 DCR 528.)

Cross references. — As to additional penalty for committing a crime when armed, see §§ 22-3201 and 22-3202.

Effect of amendments. — D.C. Law 10-119 substituted “such individual” for “she” preceding “shall engage”; substituted “such individual” for “her” following “procure” and “compel”; substituted “such individual’s” for “her” twice; substituted “the abductor” for “him”; and substituted “individual” for “female” throughout the section.

D.C. Law 11- (Act 11-198) validated a previous made technical correction.

Legislative history of Law 10-119. — See note to § 22-2704.

Legislative history of Law 11- (Act 11-198). — Law 11- (Act 11-198), the “Criminal Code Technical Amendments Act of 1996,” was introduced in Council and assigned Bill No. 11-484, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on December 5, 1995, and January 4, 1996, respectively. Signed by the Mayor on January 26, 1996, it was assigned Act No. 11-198 and transmitted to both Houses of Congress for its review. D.C. Law 11- (Act 11-198) is projected to become law on May 16, 1996.

Lesser included offense doctrine not considered where separate acts involved. — Where the offenses arise out of separate acts no need exists to consider whether the offense of inducing a female to engage in prostitution is

a lesser included offense of compelling a female to reside with a person for purposes of prostitution. *Villines v. United States*, App. D.C., 320 A.2d 313 (1974).

Proper to charge and convict for both inducement and attempt. — It is proper to charge one count of the indictment that the defendant compelled, induced, enticed and procured a certain female to engage in prostitution, and in another count to charge an attempt, and convictions for both counts are proper. *Welch v. United States*, 135 F.2d 465 (D.C. Cir.), cert. denied, 319 U.S. 769, 63 S. Ct. 1329, 87 L. Ed. 1718 (1943).

Corroboration instruction not required where sexual activity not involved. — The court is not required to instruct on corroboration in a prosecution under this section where none of the offenses involve sexual activity between the defendant and the complainant. *Villines v. United States*, App. D.C., 320 A.2d 313 (1974).

Cited in *Wright v. United States*, 183 F.2d 821 (D.C. Cir. 1950); *Clarke v. United States*, 301 F.2d 543 (D.C. Cir. 1962); *Godfrey v. United States*, App. D.C., 454 A.2d 293 (1982); *United States v. Anderson*, 618 F. Supp. 1335 (D.D.C. 1985), aff’d, 851 F.2d 384 (D.C. Cir. 1988), cert. denied, 488 U.S. 1012, 109 S. Ct. 801, 102 L. Ed. 2d 792 (1989); *United States v. Anderson*, 851 F.2d 384 (D.C. Cir. 1988), cert. denied, 488 U.S. 1012, 109 S. Ct. 801, 102 L. Ed. 2d 792 (1989).

§ 22-2706. Compelling an individual to live life of prostitution against his or her will.

Any person who, within the District of Columbia, by threats or duress, detains any individual against such individual’s will, for the purpose of prostitution or sexual intercourse, or any person who shall compel any individual against such individual’s will, to reside with him or her or with any other person for the purposes of prostitution or sexual intercourse, shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and a fine of not more than \$1,000. (June 25, 1910, 36 Stat. 833, ch. 404, § 2; Jan. 3, 1941, 54 Stat. 1225, ch. 936, § 2; 1973 Ed., § 22-2706; May 21, 1994, D.C. Law 10-119, § 12(b), 41 DCR 1639.)

Cross references. — As to additional penalty for committing crime when armed, see §§ 22-3201 and 22-3202.

Effect of amendments. — D.C. Law 10-119 inserted "or her"; and substituted "individual" for "female" and "such individual's" for "her" throughout the section.

Legislative history of Law 10-119. — See note to § 22-2704.

Lesser included offense doctrine not considered where separate acts involved. — Where the offenses arise out of separate acts no need exists to consider whether the offense

of inducing a female to engage in prostitution is a lesser included offense of compelling a female to reside with a person for purposes of prostitution. *Villines v. United States*, App. D.C., 320 A.2d 313 (1974).

Corroboration instruction not required where sexual activity not involved. — The court is not required to instruct on corroboration in a prosecution under this section where none of the offenses involve sexual activity between the defendant and the complainant. *Villines v. United States*, App. D.C., 320 A.2d 313 (1974).

§ 22-2707. Procuring; receiving money or other valuable thing for arranging assignation.

Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of arranging for or causing any individual to have sexual intercourse with any other person or to engage in prostitution, debauchery, or any other immoral act, shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and a fine of not more than \$1,000. (June 25, 1910, 36 Stat. 833, ch. 404, § 3; Jan. 3, 1941, 54 Stat. 1226, ch. 936, § 3; 1973 Ed., § 22-2707; May 21, 1994, D.C. Law 10-119, § 12(c), 41 DCR 1639.)

Cross references. — As to prohibition of sexual performances using minors, see subchapter II of Chapter 20 of this title.

Effect of amendments. — D.C. Law 10-119 substituted "individual" for "female."

Legislative history of Law 10-119. — See note to § 22-2704.

Section constitutional. — This section is not void for vagueness, or so vague as to violate due process. *Langley v. United States*, App. D.C., 264 A.2d 503 (1970).

Scope of section. — This section includes not only the actual act of procurement but also the agreement to procure. *Sellers v. United States*, App. D.C., 131 A.2d 300 (1957).

Elements of offense. — Two principal elements of the crime of procuring are the receipt of money and the arranging of an assignation. *Sellers v. United States*, App. D.C., 131 A.2d 300 (1957); *Walker v. United States*, App. D.C., 248 A.2d 187 (1968).

Under this section, the gist of the offense is the placing of a female in a house of prostitution or elsewhere for purpose of causing her illegally to cohabit with any male person or persons and not the receiving of money. *Boykin v. United States*, 130 F.2d 416 (D.C. Cir. 1942) (decided prior to 1941 amendment).

Evidence of condition of defendant's house relevant in proving offense. — Evidence of the conditions of the defendant's house at the time of her arrest is competent and relevant in proving one of the elements of the

offense, i.e., "engagement in prostitution." *Smith v. United States*, 180 F.2d 775 (D.C. Cir. 1950).

Term "arranging" embraces many more activities than the one of procuring. *Byas v. United States*, 182 F.2d 94 (D.C. Cir. 1950).

And the word "arrange" needs no judicial definition, as is a common word and admits of no double entendre. *Byas v. United States*, 182 F.2d 94 (D.C. Cir. 1950).

Amount of money received and time of payment immaterial. — Under this section, it is immaterial whether the procurer receives much or little, and it is not important whether payment is made all at once in a lump sum or in scattered amounts at different times. *Boykin v. United States*, 130 F.2d 416 (D.C. Cir. 1942).

As is receipt of money itself. — The fact that actions never progressed beyond the stage of conversation and that no money was received is not fatal to a conviction for an attempt to receive money for arranging for a female to have sexual intercourse. *Sellers v. United States*, App. D.C., 131 A.2d 300 (1957).

But keeping and maintaining girl no ground for conviction. — Under this section, the keeping and maintaining of a girl for a prohibited purpose cannot be grounds for conviction. *Boykin v. United States*, 130 F.2d 416 (D.C. Cir. 1942).

Section does not penalize brothel keeper as such or agents who procure patrons for brothels or for woman elsewhere so

long as they do nothing toward bringing the woman there for an immoral act in exchange for money or value received. *Boykin v. United States*, 130 F.2d 416 (D.C. Cir. 1942).

Counts relating to different females joinable. — Where some counts of the indictment relate to one female and some to another, the crimes charged in the several counts are of the same character, permitting joinder. *Smith v. United States*, 180 F.2d 775 (D.C. Cir. 1950).

Uncorroborated testimony of witness testifying falsely concerning material fact can be disregarded. — In a prosecution for attempted procuring, if a witness testifies falsely concerning any material fact, about which he cannot be reasonably mistaken, all his testimony can be disregarded, except such parts as are corroborated by other testimony. *Smith v. United States*, App. D.C., 269 A.2d 446 (1970).

Evidence sufficient to sustain conviction. — Evidence is sufficient to sustain a conviction for attempted procuring where the defendant and the complaining witness bargained until they agreed upon an exchange of

money, although uncertain in amount, for services of a prostitute, and immediately thereafter the defendant led the complaining witness a considerable distance to a hotel, unknown to the witness, where the prostitute was supposedly waiting. *Walker v. United States*, App. D.C., 248 A.2d 187 (1968).

Defendant convicted of separate acts of receiving money for single placing sentenced once. — In a prosecution for violating this section through separate acts of receiving money for a single placing, the defendant can be sentenced only once for a conviction. *Boykin v. United States*, 130 F.2d 416 (D.C. Cir. 1942).

Cited in *Colbert v. United States*, 146 F.2d 10 (D.C. Cir. 1944); *Wright v. United States*, 183 F.2d 821 (D.C. Cir. 1950); *Fabianich v. United States*, 302 F.2d 904 (D.C. Cir.), cert. denied, 371 U.S. 816, 83 S. Ct. 29, 9 L. Ed. 2d 57 (1962); *Blakney v. United States*, App. D.C., 225 A.2d 654 (1967); *Godfrey v. United States*, App. D.C., 454 A.2d 293 (1982); *United States v. Jones*, 909 F.2d 533 (D.C. Cir. 1990); *Swanson v. United States*, App. D.C., 602 A.2d 1102 (1992).

§ 22-2708. Causing spouse to live in prostitution.

Any person who by force, fraud, intimidation, or threats, places or leaves, or procures any other person or persons to place or leave, a spouse in a house of prostitution, or to lead a life of prostitution, shall be guilty of a felony, and upon conviction thereof shall be imprisoned not less than 1 nor more than 10 years. (June 25, 1910, 36 Stat. 833, ch. 404, § 4; 1973 Ed., § 22-2708; May 21, 1994, D.C. Law 10-119, § 12(d), 41 DCR 1639.)

Cross references. — As to additional penalty for committing crime when armed, see §§ 22-3201 and 22-3202.

Effect of amendments. — D.C. Law 10-119 substituted “a spouse” for “his wife.”

Legislative history of Law 10-119. — See note to § 22-2704.

§ 22-2709. Detaining an individual in disorderly house for debt there contracted.

Any person or persons who attempt to detain any individual in a disorderly house or house of prostitution because of any debt or debts such individual has contracted, or is said to have contracted, while living in said house of prostitution or disorderly house shall be guilty of a felony, and on conviction thereof be imprisoned for a term not less than 1 nor more than 5 years. (June 25, 1910, 36 Stat. 833, ch. 404, § 5; 1973 Ed., § 22-2709; May 21, 1994, D.C. Law 10-119, § 12(e), 41 DCR 1639.)

Effect of amendments. — D.C. Law 10-119 substituted “any individual” for “any girl or woman”; and substituted “such individual” for “she.”

Legislative history of Law 10-119. — See note to § 22-2704.

§ 22-2710. Procuring for house of prostitution.

Any person who, within the District of Columbia, shall pay or receive any money or other valuable thing for or on account of the procuring for, or placing in, a house of prostitution, for purposes of sexual intercourse, prostitution, debauchery, or other immoral act, any individual, shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and by a fine of not more than \$1,000. (June 25, 1910, ch. 436, § 6; Jan. 3, 1941, 54 Stat. 1226, ch. 936, § 4; 1973 Ed., § 22-2710; May 21, 1994, D.C. Law 10-119, § 13(a), 41 DCR 1639.)

Section references. — This section is referred to in § 22-2714.

Effect of amendments. — D.C. Law 10-119 substituted “individual” for “female.”

Legislative history of Law 10-119. — See note to § 22-2704.

§ 22-2711. Procuring for third persons.

Any person who, within the District of Columbia, shall receive any money or other valuable thing for or on account of procuring and placing in the charge or custody of another person for sexual intercourse, prostitution, debauchery, or other immoral purposes any individual shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and by a fine of not more than \$1,000. (June 25, 1910, ch. 436, § 7; Jan. 3, 1941, 54 Stat. 1226, ch. 936, § 4; 1973 Ed., § 22-2711; May 21, 1994, D.C. Law 10-119, § 13(b), 41 DCR 1639.)

Cross references. — As to prohibition of sexual performances using minors, see subchapter II of Chapter 20 of this title.

Section references. — This section is referred to in § 22-2714.

Effect of amendments. — D.C. Law 10-119 substituted “individual” for “female.”

Legislative history of Law 10-119. — See note to § 22-2704.

§ 22-2712. Operating house of prostitution.

Any person who, within the District of Columbia, knowingly, shall accept, receive, levy, or appropriate any money or other valuable thing, without consideration other than the furnishing of a place for prostitution or the servicing of a place for prostitution, from the proceeds or earnings of any individual engaged in prostitution shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not more than 5 years and by a fine of not more than \$1,000. (June 25, 1910, ch. 404, § 8; Jan. 3, 1941, 54 Stat. 1226, ch. 936, § 4; 1973 Ed., § 22-2712; May 21, 1994, D.C. Law 10-119, § 12(f), 41 DCR 1639.)

Section references. — This section is referred to in § 22-2714.

Effect of amendments. — D.C. Law 10-119 substituted “individual” for “female.”

Legislative history of Law 10-119. — See note to § 22-2704.

§ 22-2713. Premises occupied for lewdness, assignation, or prostitution declared nuisance.

Whoever shall erect, establish, continue, maintain, use, own, occupy, or release any building, erection, or place used for the purpose of lewdness, assignation, or prostitution in the District of Columbia is guilty of a nuisance, and the building, erection, or place, or the ground itself in or upon which such lewdness, assignation, or prostitution is conducted, permitted, or carried on, continued, or exists, and the furniture, fixtures, musical instruments, and contents are also declared a nuisance, and shall be enjoined and abated as hereinafter provided. (Feb. 7, 1914, 38 Stat. 280, ch. 16, § 1; 1973 Ed., § 22-2713.)

Cross references. — As to authority and duty of Chief of Police in regard to houses of prostitution, see §§ 4-145 and 4-146.

Section references. — This section is referred to in §§ 22-2714, 22-2717 and 22-2720.

Intent of this section is to enjoin and abate houses of lewdness, assignation, and prostitution, but owners or lessees are affected only where the guilty knowledge is brought home to

them. *Holmes v. United States*, 269 F. 489 (D.C. Cir. 1921).

Bawdy house is a classic example of a nuisance per se and the government is not obliged to present a series of witnesses to testify that the house disturbs them as individuals in order to procure an order of abatement. *Raleigh v. United States*, App. D.C., 351 A.2d 510 (1976).

§ 22-2714. Abatement of nuisance under § 22-2713 by injunction — Temporary injunction.

Whenever a nuisance is kept, maintained, or exists, as defined in §§ 22-2710 to 22-2718, the United States Attorney for the District of Columbia, or the Attorney General of the United States, or any citizen of the District of Columbia, may maintain an action in equity in the name of the United States of America, upon the relation of such United States Attorney for the District of Columbia, the Attorney General of the United States, or citizen, to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same, and the owner or agent of the building or ground upon which said nuisance exists. In such action the court, or a judge in vacation, shall, upon the presentation of a petition therefor alleging that the nuisance complained of exists, allow a temporary writ of injunction, without bond, if it shall be made to appear to the satisfaction of the court or judge by evidence in the form of affidavits, depositions, oral testimony, or otherwise, as the complainant may elect, unless the court or judge by previous order shall have directed the form and manner in which it shall be presented. Three days notice, in writing, shall be given the defendant of the hearing of the application, and if then continued at his instance the writ as prayed shall be granted as a matter of course. When an injunction has been granted it shall be binding on the defendant throughout the District of Columbia and any violation of the provisions of injunction herein provided shall be a contempt as hereinafter provided. (Feb. 7, 1914, 38 Stat. 280, ch. 16, § 2; 1973 Ed., § 22-2714.)

Section references. — This section is referred to in §§ 22-2716, 22-2717 and 22-2720.

§ 22-2715. Same — Trial; dismissal of complaint; prosecution; costs.

The action when brought shall be triable at the first term of court, after due and timely service of the notice has been given, and in such action evidence of the general reputation of the place shall be admissible for the purpose of proving the existence of said nuisance. If the complaint is filed by a citizen, it shall not be dismissed, except upon a sworn statement made by the complainant and the complainant's attorney, setting forth the reasons why the action should be dismissed, and the dismissal approved by the United States Attorney for the District of Columbia or the Attorney General of the United States of America in writing or in open court. If the court is of the opinion that the action ought not to be dismissed, it may direct the United States Attorney for the District of Columbia to prosecute said action to judgment; and if the action is continued more than 1 term of court, any citizen of the District of Columbia, or the United States Attorney for the District of Columbia, may be substituted for the complaining party and prosecute said action to judgment. If the action is brought by a citizen, and the court finds there was no reasonable ground or cause for said action, the costs may be taxed to such citizen. (Feb. 7, 1914, 38 Stat. 281, ch. 16, § 3; June 25, 1948, 62 Stat. 909, ch. 646, § 1; 1973 Ed., § 22-2715; May 21, 1994, D.C. Law 10-119, § 14(a), 41 DCR 1639.)

Section references. — This section is referred to in §§ 22-2714, 22-2717 and 22-2720.

Effect of amendments. — D.C. Law 10-119 substituted "the complainant's" for "his" in the second sentence.

Legislative history of Law 10-119. — See note to § 22-2704.

§ 22-2716. Violation of injunction granted under § 22-2714.

In case of the violation of any injunction granted under the provisions of § 22-2714, the court, or, in vacation, a judge thereof, may summarily try and punish the offender. The proceedings shall be commenced by filing with the clerk of the court an information, under oath, setting out the alleged facts constituting such violation, upon which the court or judge shall cause a warrant to issue, under which the defendant shall be arrested. The trial may be had upon affidavits, or either party may at any stage of the proceedings demand the production and oral examination of the witnesses. A party found guilty of contempt, under the provisions of this section, shall be punished by a fine of not less than \$200 nor more than \$1,000 or by imprisonment in the District Jail not less than three nor more than 6 months or by both fine and imprisonment. (Feb. 7, 1914, 38 Stat. 281, ch. 16, § 4; 1973 Ed., § 22-2716.)

Section references. — This section is referred to in §§ 22-2714, 22-2717 and 22-2720.

§ 22-2717. Order of abatement; sale of property; entry of closed premises punishable as contempt.

If the existence of the nuisance be established in an action as provided in §§ 22-2713 to 22-2720, or in a criminal proceeding, an order of abatement shall be entered as a part of the judgment in the case which order shall direct the removal from the building or place of all fixtures, furniture, musical instruments, or movable property used in conducting the nuisance, and shall direct the sale thereof in the manner provided for the sale of chattels under execution, and the effectual closing of the building or place against its use for any purpose, and so keeping it closed for a period of 1 year, unless sooner released. If any person shall break and enter or use a building, erection, or place so directed to be closed such person shall be punished as for contempt, as provided in § 22-2716. (Feb. 7, 1914, 38 Stat. 281, ch. 16, § 5; Oct. 15, 1970, 84 Stat. 931, Pub. L. 91-452, title II, § 257; 1973 Ed., § 22-2717; May 21, 1994, D.C. Law 10-119, § 14(b), 41 DCR 1639.)

Section references. — This section is referred to in §§ 22-2714, 22-2718 and 22-2720.

Effect of amendments. — D.C. Law 10-119 substituted “such person” for “he” near the end.

Legislative history of Law 10-119. — See note to § 22-2704.

Owner's knowledge of illegal activities required. — For an abatement order to be entered against a bawdy house, evidence must show that the owner knew or should have known of the illegal activities taking place on his property. *United States v. Simms*, 113 WLR 641 (Super. Ct. 1985).

Knowledge of use of premises inferred from open and notorious acts. — Where the involvement of the lessee in the operation of the bawdy house is conceded and are acts of prostitution are open, obvious, notorious and continuing, the lessor should know that the property is being used for illegal purposes. *Thomas*

Circle Ltd. Partnership v. United States, App. D.C., 372 A.2d 555 (1977).

Bawdy house is a classic example of a nuisance per se and the government is not obliged to present a serious of witnesses to testify that the house disturbs them as individuals in order to procure an order of abatement. *Raleigh v. United States*, App. D.C., 351 A.2d 510 (1976).

House deemed nuisance following conviction under § 22-2722. — Where the defendant is found guilty of maintaining a bawdy or disorderly house in violation of § 22-2722, the house has to be deemed a nuisance per se and the court is compelled to issue an order of abatement. *Raleigh v. United States*, App. D.C., 351 A.2d 510 (1976).

Cited in *District of Columbia v. 313 M St.*, App. D.C., 633 A.2d 820 (1993).

§ 22-2718. Disposition of proceeds of sale.

The proceeds of the sale of the personal property as provided in § 22-2717, shall be applied in the payment of the costs of the action and abatement and the balance, if any, shall be paid to the defendant. (Feb. 7, 1914, 38 Stat. 281, ch. 16, § 6; 1973 Ed., § 22-2718.)

Section references. — This section is referred to in §§ 22-2714, 22-2717 and 22-2720.

§ 22-2719. Bond for abatement; order for delivery of premises; effect of release.

If the owner appears and pays all costs of the proceeding and files a bond, with sureties to be approved by the clerk, in the full value of the property, to be ascertained by the court or, in vacation, by the Collector of Taxes of the

District of Columbia, conditioned that such owner will immediately abate said nuisance and prevent the same from being established or kept within a period of 1 year thereafter, the court, or, in vacation, the judge, may, if satisfied of such owner's good faith, order the premises closed under the order of abatement to be delivered to said owner and said order of abatement canceled so far as the same may relate to said property; and if the proceeding be an action in equity and said bond be given and costs therein paid before judgment and order of abatement, the action shall be thereby abated as to said building only. The release of the property under the provisions of this section shall not release it from judgment, lien, penalty, or liability to which it may be subject by law. (Feb. 7, 1914, 38 Stat. 281, ch. 16, § 7; 1973 Ed., § 22-2719; May 21, 1994, D.C. Law 10-119, § 14(c), 41 DCR 1639.)

Section references. — This section is referred to in §§ 22-2717 and 22-2720.

Effect of amendments. — D.C. Law 10-119 substituted "such owner" for "he" and "such owner's" for "his" in the first sentence.

Legislative history of Law 10-119. — See note to § 22-2704.

Office of Collector of Taxes abolished. — The Office of the Collector of Taxes was abolished and the functions thereof transferred to the Board of Commissioners of the District of Columbia by Reorganization Plan No. 5 of 1952. All functions of the Office of the Collector of Taxes including the functions of all officers, employees and subordinate agencies were transferred to the Director, Department of General Administration by Reorganization Order No. 3, dated August 28, 1952. Reorganization Order No. 20, dated November 10, 1952, transferred the functions of the Collector of Taxes to the Finance Office. The same Order provided for the Office of the Collector of Taxes headed by a Collector in the Finance Office, and abolished the previously existing Office of the Collector of Taxes. Reorganization Order No. 20 was superseded and replaced by Organization Order No.

121, dated December 12, 1957, which provided that the Finance Office (consisting of the Office of the Finance Officer, Property Tax Division, Revenue Division, Treasury Division, Accounting Division, and Data Processing Division) would continue under the direction and control of the Director of General Administration, and that the Treasury Division would perform the function of collecting revenues of the District of Columbia and depositing the same with the Treasurer of the United States. Organization Order No. 121 was revoked by Organization Order No. 3, dated December 13, 1967, Part IVC of which prescribed the functions of the Finance Office within a newly established Department of General Administration. The executive functions of the Board of Commissioners were transferred to the Commissioner of the District of Columbia by § 401 of Reorganization Plan No. 3 of 1967. Functions of the Finance Office as stated in Part IVC of Organization Order No. 3 were transferred to the Director of the Department of Finance and Revenue by Commissioner's Order No. 69-96, dated March 7, 1969.

§ 22-2720. Tax for maintaining such nuisance.

Whenever a permanent injunction issues against any person for maintaining a nuisance as herein defined, or against any owner or agent of the building kept or used for the purpose prohibited by §§ 22-2713 to 22-2720, there shall be assessed against said building and the ground upon which the same is located and against the person or persons maintaining said nuisance, and the owner or agent of said premises, a tax of \$300. The assessment of said tax shall be made by the Director of the Department of Finance and Revenue of the District of Columbia and shall be made within 3 months from the date of the granting of the permanent injunction. In case the Director fails or neglects to make said assessment the same shall be made by the Chief of Police, and a return of said assessment shall be made to the Collector of Taxes. Said tax shall be a perpetual lien upon all property, both personal and real used for the

purpose of maintaining said nuisance, and the payment of said tax shall not relieve the person or building from any other penalties provided by law. The provisions of the law relating to the collection and distribution of taxes upon personal and real property shall govern in the collection and distribution of the tax herein prescribed in so far as the same are applicable and not in conflict with the provisions of said sections. (Feb. 7, 1914, 38 Stat. 282, ch. 16, § 8; Oct. 15, 1970, 84 Stat. 931, Pub. L. 91-452, title II, § 258; 1973 Ed., § 22-2720.)

Cross references. — As to collection and disbursement of taxes, see § 47-401 et seq.

Section references. — This section is referred to in § 22-2717.

Office of Assessor abolished. — The Office of the Assessor was abolished and the functions thereof transferred to the Board of Commissioners of the District of Columbia by Reorganization Plan No. 5 of 1952. All functions of the Office of the Assessor including the functions of all officers, employees and subordinate agencies were transferred to the Department of General Administration by Reorganization Order No. 3 of the Board of Commissioners, dated August 28, 1952. Reorganization Order No. 20, dated November 10, 1952, abolished the Office of the Assessor and transferred the functions to the Finance Office in the Department of General Administration. The same Order provided that an Office of the Assessor would be created in the Finance Office. Reorganization Order No. 20 was superseded and replaced by Organization Order No. 121, dated December 12, 1957, which provided that the Finance Office (consisting of the Office of the Finance Officers, Property Tax Division, Revenue Division, Treasury Division, Accounting Division, and Data Processing Division) shall continue under the direction and control of the Director of General Administration, and prescribed the functions thereof. The executive functions of the Board of Commissioners were transferred to the Commissioner of the District of Columbia by § 401 of Reorganization Plan No. 3 of 1967. Organization Order No. 121 was revoked by Organization Order No. 3, dated December 13, 1967, Part IVC of which prescribed the functions of the Finance Office within a newly established Department of General Administration. Functions of the Finance Office as stated in Part IVC of Organization Order No. 3 were transferred to the Director of the Department of Finance and Revenue by Commissioner's Order No. 69-96, dated March 7, 1969.

Office of Collector of Taxes abolished. —

The Office of the Collector of Taxes was abolished and the functions thereof transferred to the Board of Commissioners of the District of Columbia by Reorganization Plan No. 5 of 1952. All functions of the Office of the Collector of Taxes including the functions of all officers, employees and subordinate agencies were transferred to the Director, Department of General Administration by Reorganization Order No. 3, dated August 28, 1952. Reorganization Order No. 20, dated November 10, 1952, transferred the functions of the Collector of Taxes to the Finance Office. The same Order provided for the Office of the Collector of Taxes headed by a Collector in the Finance Office, and abolished the previously existing Office of the Collector of Taxes. Reorganization Order No. 20 was superseded and replaced by Organization Order No. 121, dated December 12, 1957, which provided that the Finance Office (consisting of the Office of the Finance Officer, Property Tax Division, Revenue Division, Treasury Division, Accounting Division, and Data Processing Division) would continue under the direction and control of the Director of General Administration, and that the Treasury Division would perform the function of collecting revenues of the District of Columbia and depositing the same with the Treasurer of the United States. Organization Order No. 121 was revoked by Organization Order No. 3, dated December 13, 1967, Part IVC of which prescribed the functions of the Finance Office within a newly established Department of General Administration. The executive functions of the Board of Commissioners were transferred to the Commissioner of the District of Columbia of § 401 of Reorganization Plan No. 3 of 1967. Functions of the Finance Office as stated in Part IVC of Organization Order No. 3 were transferred to the Director of the Department of Finance and Revenue by Commissioner's Order No. 69-96, dated March 7, 1969.

§ 22-2721. Granting immunity to witnesses.

Repealed. Oct. 15, 1970, 84 Stat. 931, Pub. L. 91-452, title II, § 256.

§ 22-2722. Keeping bawdy or disorderly houses.

Whoever is convicted of keeping a bawdy or disorderly house in the District shall be fined not more than \$1,000 or imprisoned not more than 180 days, or both. (July 16, 1912, 37 Stat. 192, ch. 235, § 1; Dec. 23, 1963, 77 Stat. 617, Pub. L. 88-241, § 11(a); 1973 Ed., § 22-2722; Aug. 20, 1994, D.C. Law 10-151, § 107, 41 DCR 2608.)

Section references. — This section is referred to in § 22-3203.

Effect of amendments. — D.C. Law 10-151 substituted “\$1,000” for “\$500” and substituted “180 days” for “1 year.”

Emergency act amendments. — For temporary amendment of section, see § 107 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — Law 10-151, the “Omnibus Criminal Justice Reform Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

Application of section to homosexual acts constitutional. — The application of this section to a situation revealing homosexual acts between consenting adults does not amount to an overbroad encroachment upon constitutionally protected conduct. *Harris v. United States*, App. D.C., 293 A.2d 851 (1972), rev'd on other grounds, App. D.C. 315 A.2d 569 (1974).

Acts of sodomy which allegedly occur at a “homosexual health club” are not protected by any recognized right to privacy. *Harris v. United States*, App. D.C., 315 A.2d 569 (1974).

Common law crime defined. — The common law crime of “keeping a disorderly house” is the maintenance of premises upon which activity occurs that either creates a public disturbance or, though concealed from the public, constitutes a nuisance per se, such as a gambling house or bawdy house. *Harris v. United States*, App. D.C., 315 A.2d 569 (1974).

Congress empowered to make keeping disorderly house crime. — Though the crime of keeping a disorderly house may not have been an infamous crime at common law, it is within the power of Congress to impose a penalty that will make it such in the District. *Palmer v. Lenovitz*, 35 App. D.C. 303 (1910).

Elements of offense. — To establish the offense of keeping a bawdy or disorderly house, the government must prove that acts take place

on the premises in question that disturb the public or constitute a nuisance per se, that the premises are regularly resorted to for the commission of such acts and that the proprietor knows or should know of the acts and does nothing to prevent them. *Harris v. United States*, App. D.C., 315 A.2d 569 (1974).

Actual knowledge of acts done on premises unnecessary. — In a prosecution for maintaining a disorderly house, it is not necessary to prove actual knowledge of the acts done on the premises if it can be shown that the defendants should have known what was happening. *Killeen v. United States*, App. D.C., 224 A.2d 302 (1966).

For proprietor is presumed to have knowledge of what goes on in premises. *Killeen v. United States*, App. D.C., 224 A.2d 302 (1966).

But presumption not conclusive. — In a prosecution for keeping a disorderly house, the presumption that every person is presumed to have knowledge of what goes on in his own premises is not conclusive, for the owner can be found guilty only where he knew or should have known of the unlawful and immoral acts committed on the premises. *Killeen v. United States*, App. D.C., 224 A.2d 302 (1966).

Regularity of unlawful conduct. — To support a conviction under this section for keeping a bawdy or disorderly house, the government must prove that the premises are regularly used for the commission of illegal or immoral acts, thus, evidence from stakeouts and a search on 3 different days were relevant to show the required regularity of unlawful conduct even though such conduct was only charged on 1 day. *Thomas v. United States*, App. D.C., 588 A.2d 272 (1991).

House used for homosexual activities deemed bawdy house. — Where a house is used by males for a variety of homosexual activities including sodomy, a conviction may be had for keeping a bawdy house, as distinguished from a disorderly house. *Harris v. United States*, App. D.C., 293 A.2d 851 (1972), rev'd on other grounds, App. D.C., 315 A.2d 569 (1974).

And nuisance per se. — A “homosexual health club” where acts of sodomy take place is similar to a bawdy house and constitutes a nuisance per se. *Harris v. United States*, App. D.C., 315 A.2d 569 (1974).

Arrest warrant affidavit should state sufficient facts. — An affidavit supporting an application for a warrant for an arrest for the operation of a disorderly house should allege sufficient facts to establish probable cause. *Wood v. United States*, App. D.C., 183 A.2d 563 (1962), cert. denied, 371 U.S. 963, 83 S. Ct. 543, 9 L. Ed. 2d 510 (1963).

And recitation of legal conclusion insufficient. — An affidavit for a warrant of arrest which merely recites a legal conclusion that a person is maintaining a disorderly house is insufficient. *Darnall v. United States*, App. D.C., 33 A.2d 734 (1943).

Justification adequate for issuing warrant. — A parade of males into an apartment and a past criminal record as a convicted madam and vagrant provides adequate justification for issuing a warrant for an arrest for keeping a disorderly house. *Bennett v. United States*, App. D.C., 171 A.2d 252 (1961).

Admissible evidence. — Registration cards seized in the search of a home in connection with an arrest for operating a disorderly house are admissible. *Wood v. United States*, App. D.C., 183 A.2d 563 (1962), cert. denied, 371 U.S. 963, 83 S. Ct. 543, 9 L. Ed. 2d 510 (1963).

In a prosecution for keeping a bawdy or disorderly house, the court may admit rental receipts from the establishment. *Raleigh v. United States*, App. D.C., 351 A.2d 510 (1976).

In a prosecution for keeping a bawdy or disorderly house, a copy of the annual report of the corporate owner of the premises may be admitted. *Raleigh v. United States*, App. D.C., 351 A.2d 510 (1976).

Admission of investigative reports not harmful in absence of prejudice. — Even if the admission into evidence of reports by a police officer who investigated the alleged disorderly house is in error, this error is harmless where the officer testifies fully as to their contents and no prejudice is shown. *Killeen v. United States*, App. D.C., 224 A.2d 302 (1966).

But admission of illegally seized evidence reversible error. — In a prosecution for maintaining a disorderly house, the admission into evidence of a hotel register which was seized under a void warrant, is reversible error. *Darnall v. United States*, App. D.C., 33 A.2d 734 (1943).

Which defendant waives not by failing to object before entering plea. — In a prosecution for maintaining a disorderly house the

defendant, by failing to move to quash the warrant of arrest before entering a plea of not guilty, does not "waive" his right to object to the introduction of unlawfully seized evidence. *Darnall v. United States*, App. D.C., 33 A.2d 734 (1943).

Evidence of good character can be considered in determining the credibility of witnesses. *Killeen v. United States*, App. D.C., 224 A.2d 302 (1966).

Proof of ownership or legal control of premises. — To prove a defendant has "maintained" or "kept" a disorderly house, the government does not have to prove ownership or legal control of the premises, the government only needs to establish that appellant in fact controlled or managed the premises. *Thomas v. United States*, App. D.C., 588 A.2d 272 (1991).

Evidence sufficient to show guilt. — A connection with the corporate owner of a house in which the defendant maintained an office which he visited frequently, coupled with the undisguised and recurrent use of the premises by prostitutes and customers, is sufficient to show that he knew the nature of the activities conducted on the premises and that he either procured it to be done or permitted it to be done or did nothing to prevent it and that he is guilty of keeping a bawdy house. *Raleigh v. United States*, App. D.C., 351 A.2d 510 (1976).

Recommendation of sentence by probation officer unauthorized. — A recommendation by a probation officer as to the sentence to be imposed under this section is unauthorized and is an infringement upon the court's judicial function. *Iskanian v. United States*, App. D.C., 35 A.2d 176 (1944).

Conviction reversed upon new construction of section. — Where, on reviewing of a conviction of keeping a bawdy or disorderly house, an authoritative construction of this section is rendered and an earlier construction is rejected, the conviction will be reversed. *Harris v. United States*, App. D.C., 315 A.2d 569 (1974).

Cited in *Collins v. United States*, App. D.C., 41 A.2d 515 (1945); *Packard v. United States*, App. D.C., 77 A.2d 19 (1950); *Bennett v. United States*, App. D.C., 171 A.2d 252 (1961); *Powers v. United States*, App. D.C., 412 A.2d 1205 (1980); *United States v. Duncan*, 115 WLR 2517 (Super. Ct. 1987); *Sobin v. United States*, App. D.C., 606 A.2d 1029 (1992).

§ 22-2723. Property subject to seizure and forfeiture.

(a) The following are subject to forfeiture:

(1) All conveyances, including aircraft, vehicles or vessels, which are

used, or intended for use, to transport, or in any manner to facilitate a violation of this act, provided that:

(A) No conveyance used by any person as a common carrier in the course of transacting business as a common carrier is subject to forfeiture under this section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this act;

(B) No conveyance is subject to forfeiture under this section by reason of any act or omission that the owner establishes was committed or omitted without the owner's knowledge or consent;

(C) A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if the secured party neither had knowledge of nor consented to the act or omission; or

(D) Where the conveyance is not being driven by the owner of the conveyance, there is a presumption that the owner is without knowledge of the illegal act, and therefore the conveyance should not be forfeited.

(2) All money, coins, and currency which has been used, or was intended for use, in violation of this act.

(b) All seizures and forfeitures of property under this section shall be pursuant to § 33-552. (Aug. 15, 1935, ch. 546, § 5, as added May 7, 1993, D.C. Law 9-267, § 2, 39 DCR 5684.)

Temporary amendment of section. — Section 3 of D.C. Law 11-77 amended this section by inserting a new (a-1) to read as follows:

"(a-1)(1) A lien in favor of the District of Columbia is hereby created in an amount equal to the costs of towing, storing, and administratively processing a conveyance seized and subject to forfeiture pursuant to this act.

(2) The Mayor, or his or her designee, shall establish a reasonable cost for the towing, storing, and administratively processing of seized conveyances.

(3) The Corporation Counsel of the District of Columbia, or his or her designee, may agree to release a lien by stipulation with the registered owner or lienholder of a seized conveyance, where no stipulation has been executed previously."

Section 5(b) of D.C. Law 11-77 provided that the act shall expire on the 225th day of its having taken effect or on the effective date of the Safe Streets Anti-Prostitution Act of 1995, whichever occurs first.

Emergency act amendments. — For temporary amendment of section, see § 3 of the

Safe Streets Anti-Prostitution Emergency Amendment Act of 1995 (D.C. Act 11-133, August 11, 1995, 42 DCR 4680) and see § 3 of the Safe Streets Anti-Prostitution Legislative Review Emergency Amendment Act of 1995 (D.C. Act 11-153, November 9, 1995, 42 DCR 6567).

Legislative history of Law 9-267. — Law 9-267, the "Safe Streets Forfeiture Amendment Act of 1992," was introduced in Council and assigned Bill No. 9-260, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on June 2, 1992, and July 7, 1992, respectively. Signed by the Mayor on July 21, 1992, it was assigned Act. No. 9-250 and transmitted to both Houses of Congress for its review. D.C. Law 9-267 became effective on May 7, 1993.

Legislative history of Law 11-77. — See note to § 22-2701.

References in text. — "This act," referred to in the introductory language of (a)(1), (a)(1)(A) and (a)(2), is an act for the suppression of prostitution in the District of Columbia, approved August 15, 1935, Ch. 546 (49 Stat. 651), which is codified as §§ 22-2701 and 22-2703 and this section.

CHAPTER 28. RAPE.

Sec.

22-2801. [Repealed].

§ 22-2801. Definition and penalty.

Repealed. May 23, 1995, D.C. Law 10-257, § 501(a), 42 DCR 53.

Cross references. — As to penalty for murder in first and second degrees, see § 22-2404.

As to additional penalty for committing crime when armed, see §§ 22-3201 and 22-3202.

As to minimum sentence for rape after person has been previously convicted of crime of violence, see § 24-203.

As to prohibition of sexual performances using minors, see subchapter II of Chapter 20 of this title. As to exception of child witness' testimony from corroboration requirement, see § 23-114.

As to present provisions regarding sexual abuse, see Chapter 41 of this title.

Section references. — This section is referred to in §§ 11-502, 24-203 and 24-482.

Legislative history of Law 10-257. — Law 10-257, the "Anti-Sexual Abuse Act of 1994," was introduced in Council and assigned Bill No. 10-87, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on November 1, 1994, and December 6, 1994, respectively. Signed by the Mayor on December 28, 1994, it was assigned Act No. 10-385 and transmitted to both Houses of Congress for its review. D.C. Law 10-257 became effective May 23, 1995.

Editor's notes. — Former § 22-2801 had also been amended by § 2(r) of D.C. Law 10-119.

CHAPTER 29. ROBBERY.

Sec.

22-2901. Robbery.

22-2902. Attempt to commit robbery.

22-2903. Carjacking.

§ 22-2901. Robbery.

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than 2 years nor more than 15 years. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 810; Dec. 27, 1967, 81 Stat. 737, Pub. L. 90-226, title VI, § 603; 1973 Ed., § 22-2901.)

- I. General Consideration.
 - A. In General.
 - B. Other Offenses Distinguished.
- II. Elements.
 - A. In General.
 - B. Possession.
 - C. Intent.
- III. Procedure.
 - A. In General.
 - B. Arrest; Search and Seizure.
 - C. Indictment.
 - D. Defenses.
 - E. Evidence.
 - F. Instructions.
 - G. Verdict.
 - H. Sentence.
 - I. Appeal.

I. GENERAL CONSIDERATION.

A. In General.

Cross references. — As to burglary, see § 22-1801 et seq.

As to larceny and receiving stolen goods, see § 22-3801 et seq.

As to grave robbery, see § 22-3103.

As to additional penalty for committing crime when armed, see §§ 22-3201 and 22-3202.

As to theft, see § 22-3811.

As to receiving stolen property, see § 22-3832.

As to enhanced penalty for crimes committed against senior citizen victims, see § 22-3901.

As to minimum sentence for murder after person has been convicted of crime of violence, see § 24-203.

Section references. — This section is referred to in §§ 11-502, 22-2902 and 23-546.

Section is constitutionally valid. Pope v. Huff, 141 F.2d 727 (D.C. Cir. 1944).

Section is applicable throughout the District. United States v. Spears, 449 F.2d 946 (D.C. Cir. 1971).

Intent of section. — This section is intended for protection against theft of property from the person, aided by force or violence or by fear caused by the threat of it. *Rouse v. United States*, App. D.C., 402 A.2d 1218 (1979).

Robbery is a felony. *Hawkins v. United States*, App. D.C., 399 A.2d 1306 (1979).

Robbery offends the person and burglary offends the habitation. *Irby v. United States*, 250 F. Supp. 983 (D.D.C. 1965), aff'd, 390 F.2d 432 (D.C. Cir. 1967).

Cited in *Tomlinson v. United States*, 93 F.2d 652 (D.C. Cir. 1937), cert. denied, 303 U.S. 646, 58 S. Ct. 645, 82 L. Ed. 1107 (1938); *McKenzie v. United States*, 126 F.2d 533 (D.C. Cir. 1942); *Sykes v. United States*, 143 F.2d 140 (D.C. Cir. 1944); *Bullock v. United States*, 157 F.2d 702 (D.C. Cir. 1946), cert. denied, 330 U.S. 829, 67 S. Ct. 860, 91 L. Ed. 1278 (1947); *Bundy v. United States*, 193 F.2d 694 (D.C. Cir. 1951), cert. denied, 343 U.S. 908, 72 S. Ct. 638, 96 L. Ed. 1326 (1952); *Obery v. United States*, 217 F.2d 860 (D.C. Cir. 1954), cert. denied, 349 U.S. 923, 75 S. Ct. 665, 99 L. Ed. 1255 (1955); *Thompson v. United States*, 223 F.2d 627 (D.C.

- Cir. 1955), cert. denied, 350 U.S. 949, 76 S. Ct. 324, 100 L. Ed. 827 (1956); *Gilliam v. United States*, 257 F.2d 185 (D.C. Cir. 1958), cert. denied, 359 U.S. 947, 79 S. Ct. 728, 3 L. Ed. 2d 680 (1959); *Campbell v. United States*, 258 F.2d 160 (D.C. Cir. 1958); *Rogers v. United States*, 263 F.2d 902 (D.C. Cir.), cert. denied, 359 U.S. 994, 79 S. Ct. 1127, 3 L. Ed. 2d 982 (1959), 364 U.S. 848, 81 S. Ct. 92, 5 L. Ed. 2d 72 (1960); *Goldsmith v. United States*, 277 F.2d 335 (D.C. Cir.), cert. denied, 364 U.S. 863, 81 S. Ct. 106, 5 L. Ed. 2d 86 (1960); *Dixon v. United States*, 303 F.2d 226 (D.C. Cir. 1962); *Peters v. United States*, 307 F.2d 193 (D.C. Cir. 1962); *Moon v. United States*, 317 F.2d 544 (D.C. Cir. 1962), cert. denied, 375 U.S. 884, 84 S. Ct. 154, 11 L. Ed. 2d 113 (1963); *Rogers v. United States*, 318 F.2d 223 (D.C. Cir. 1963); *Graves v. United States*, 318 F.2d 265 (D.C. Cir. 1963); *Leach v. United States*, 320 F.2d 670 (D.C. Cir. 1963); *Miller v. United States*, 320 F.2d 767 (D.C. Cir. 1963); *Fennel v. United States*, 320 F.2d 784 (D.C. Cir. 1963); *Williams v. United States*, 321 F.2d 744 (D.C. Cir.), cert. denied, 375 U.S. 898, 84 S. Ct. 176, 11 L. Ed. 2d 126 (1963); *Williams v. United States*, 338 F.2d 530 (D.C. Cir. 1964); *Smith v. United States*, 340 F.2d 797 (D.C. Cir. 1964); *Jenkins v. United States*, 380 U.S. 445, 85 S. Ct. 1059, 13 L. Ed. 2d 957 (1965); *Battle v. United States*, 345 F.2d 438 (D.C. Cir. 1965); *Wynder v. United States*, 352 F.2d 662 (D.C. Cir. 1965), cert. denied, 382 U.S. 999, 86 S. Ct. 591, 15 L. Ed. 2d 487 (1966); *Kennedy v. United States*, 353 F.2d 462 (D.C. Cir. 1965); *Hurt v. United States*, 374 F.2d 283 (D.C. Cir. 1966); *Jones v. United States*, 402 F.2d 639 (D.C. Cir. 1968); *United States v. Washington*, 292 F. Supp. 284 (D.D.C. 1968); *Solomon v. United States*, 408 F.2d 1306 (D.C. Cir. 1969); *Macklin v. United States*, 409 F.2d 174 (D.C. Cir. 1969); *Davis v. United States*, 409 F.2d 458 (D.C. Cir.), cert. denied, 395 U.S. 949, 89 S. Ct. 2031, 23 L. Ed. 2d 469 (1969); *Adams v. United States*, 413 F.2d 411 (D.C. Cir. 1969); *Kee v. United States*, 418 F.2d 465 (D.C. Cir. 1969); *United States v. Hamilton*, 420 F.2d 1292 (D.C. Cir. 1969); *United States v. York*, 426 F.2d 1191 (D.C. Cir. 1969); *United States v. Weaver*, 422 F.2d 711 (D.C. Cir. 1970); *United States v. Kirby*, 427 F.2d 610 (D.C. Cir. 1970); *United States v. Shumate*, 429 F.2d 777 (D.C. Cir. 1970); *United States v. Hooper*, 432 F.2d 604 (D.C. Cir. 1970); *Sutton v. United States*, 434 F.2d 462 (D.C. Cir. 1970), cert. denied, 402 U.S. 988, 91 S. Ct. 1676, 29 L. Ed. 2d 153 (1971); *United States v. Casson*, 434 F.2d 415 (D.C. Cir. 1970); *United States v. Queen*, 435 F.2d 66 (D.C. Cir. 1970); *United States v. Wilson*, 435 F.2d 403 (D.C. Cir. 1970); *Young v. United States*, 435 F.2d 405 (D.C. Cir. 1970); *United States v. Waters*, 437 F.2d 722 (D.C. Cir. 1970); *Jackson v. United States*, 439 F.2d 529 (D.C. Cir. 1970); *United States v. Miller*, 449 F.2d 974 (D.C. Cir. 1970); *United States v. Clemons*, 440 F.2d 205 (D.C. Cir. 1970), cert. denied, 401 U.S. 945, 91 S. Ct. 959, 28 L. Ed. 2d 227 (1971); *Coleman v. United States*, 442 F.2d 150 (D.C. Cir. 1971); *United States v. Bryant*, 442 F.2d 775 (D.C. Cir.), cert. denied, 402 U.S. 932, 91 S. Ct. 1534, 28 L. Ed. 2d 866 (1971); *United States v. Parker*, 442 F.2d 779 (D.C. Cir. 1971); *United States v. Wyatt*, 442 F.2d 858 (D.C. Cir. 1971); *United States v. Clemons*, 445 F.2d 711 (D.C. Cir.), cert. denied, 404 U.S. 956, 92 S. Ct. 322, 30 L. Ed. 2d 273 (1971); *United States v. Trantham*, 448 F.2d 1036 (D.C. Cir. 1971); *Matthews v. United States*, 449 F.2d 985 (D.C. Cir. 1971); *United States v. Perry*, 449 F.2d 1026 (D.C. Cir. 1971); *United States v. Skeens*, 449 F.2d 1066 (D.C. Cir. 1971); *United States v. Thomas*, 449 F.2d 1177 (D.C. Cir. 1971); *United States v. Thomas*, 450 F.2d 1355 (D.C. Cir. 1971); *United States v. Ward*, 454 F.2d 992 (D.C. Cir. 1971); *United States v. Butler*, 325 F. Supp. 886 (D.D.C. 1971), aff'd, 481 F.2d 531 (D.C. Cir. 1973); *Bland v. Rodgers*, 332 F. Supp. 989 (D.D.C. 1971); *United States v. Ward*, 337 F. Supp. 185 (D.D.C. 1971); *Wise v. Murphy*, App. D.C., 275 A.2d 205 (1971); *United States v. Robinson*, 459 F.2d 1164 (D.C. Cir. 1972); *United States v. Jones*, 459 F.2d 1225 (D.C. Cir. 1972); *United States v. Lee*, 459 F.2d 1365 (D.C. Cir. 1972); *United States v. Ruth*, 461 F.2d 1213 (D.C. Cir. 1972); *United States v. Conner*, 462 F.2d 296 (D.C. Cir. 1972); *United States v. Thomas*, 463 F.2d 314 (D.C. Cir.), cert. denied, 409 U.S. 870, 93 S. Ct. 198, 34 L. Ed. 2d 120 (1972); *United States v. Neverson*, 463 F.2d 1224 (D.C. Cir. 1972); *United States v. Rucker*, 464 F.2d 823 (D.C. Cir. 1972); *United States v. Caldwell*, 465 F.2d 669 (D.C. Cir. 1972); *United States v. Mack*, 466 F.2d 333 (D.C. Cir.), cert. denied, 409 U.S. 952, 93 S. Ct. 297, 34 L. Ed. 2d 223 (1972); *Spriggs v. Wilson*, 467 F.2d 382 (D.C. Cir. 1972); *United States v. Howard*, 470 F.2d 406 (D.C. Cir. 1972); *United States v. Smith*, 473 F.2d 1148 (D.C. Cir. 1972); *United States v. Ash*, 413 U.S. 300, 93 S. Ct. 2568, 37 L. Ed. 2d 619 (1973); *United States v. Frazier*, 476 F.2d 891 (D.C. Cir. 1973); *United States v. Maynard*, 476 F.2d 1170 (D.C. Cir. 1973); *United States v. Sanders*, 479 F.2d 1193 (D.C. Cir. 1973); *United States v. Caldwell*, 481 F.2d 487 (D.C. Cir. 1973); *United States v. Lewis*, 482 F.2d 632 (D.C. Cir. 1973); *United States v. Toy*, 482 F.2d 632 (D.C. Cir. 1973); *United States v. Toy*, 482 F.2d 741 (D.C. Cir. 1973); *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973); *United States v. Wright*, 489 F.2d 1181 (D.C. Cir. 1973); *Skinner v. United States*, App. D.C., 310 A.2d 231 (1973); *Smith v. United States*, App. D.C., 312 A.2d 781 (1973); *United States v. Anderson*, 490 F.2d 785 (D.C. Cir. 1974); *United States v. Poole*, 495 F.2d 115 (D.C. Cir. 1974), cert. denied, 422 U.S. 1048, 95 S. Ct. 2667, 45 L. Ed. 2d 701 (1975); *United States v. Anderson*, 498 F.2d 1038 (D.C. Cir.

1974), *aff'd sub nom. United States v. Hale*, 422 U.S. 171, 95 S. Ct. 2133, 45 L. Ed. 2d 99 (1975); *United States v. McBride*, 499 F.2d 525 (D.C. Cir. 1974); *United States v. Mackin*, 502 F.2d 429 (D.C. Cir.), cert. denied, 419 U.S. 1052, 95 S. Ct. 629, 42 L. Ed. 2d 647 (1974); *United States v. Cooper*, 504 F.2d 260 (D.C. Cir. 1974); *United States v. Calloway*, 505 F.2d 311 (D.C. Cir. 1974); *United States v. Lindsay*, 506 F.2d 166 (D.C. Cir. 1974); *United States v. Jackson*, 509 F.2d 499 (D.C. Cir. 1974); *United States v. Caldwell*, 543 F.2d 1333 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087, 96 S. Ct. 877, 47 L. Ed. 2d 97 (1976); *Walker v. United States*, App. D.C., 318 A.2d 290 (1974); *Hampton v. United States*, App. D.C., 318 A.2d 598 (1974); *United States v. Sherry*, App. D.C., 318 A.2d 903 (1974); *United States v. Rawls*, App. D.C., 322 A.2d 903 (1974); *Matthews v. United States*, App. D.C., 322 A.2d 908 (1974); *Shelton v. United States*, App. D.C., 323 A.2d 717 (1974); *Edwards v. United States*, App. D.C., 328 A.2d 90 (1974); *Best v. United States*, App. D.C., 328 A.2d 378 (1974); *Crawley v. United States*, App. D.C., 328 A.2d 777 (1974); *United States v. Bridgeman*, 523 F.2d 1099 (D.C. Cir. 1975), cert. denied, 425 U.S. 961, 96 S. Ct. 1744, 48 L. Ed. 2d 206 (1976); *United States v. Thorne*, 527 F.2d 840 (D.C. Cir. 1975); *United States v. Engram*, App. D.C., 337 A.2d 488 (1975), cert. denied, 423 U.S. 1058, 96 S. Ct. 793, 46 L. Ed. 2d 648 (1976); *In re A.B.H.*, App. D.C., 343 A.2d 573 (1975); *United States v. Sedgwick*, App. D.C., 345 A.2d 465, application denied, 423 U.S. 1028, 96 S. Ct. 558, 46 L. Ed. 2d 402 (1975), cert. denied, 425 U.S. 966, 96 S. Ct. 1751, 48 L. Ed. 2d 210 (1976); *Mason v. United States*, App. D.C., 346 A.2d 250 (1975); *Johnson v. United States*, App. D.C., 349 A.2d 458 (1975); *Britton v. United States*, App. D.C., 350 A.2d 734 (1976); *United States v. Masthers*, 539 F.2d 721 (D.C. Cir. 1976); *United States v. Hurt*, 543 F.2d 162 (D.C. Cir. 1976); *United States v. Crowder*, 543 F.2d 312 (D.C. Cir. 1976), cert. denied, 429 U.S. 1062, 97 S. Ct. 788, 50 L. Ed. 2d 779 (1977); *United States v. Alston*, 551 F.2d 315 (D.C. Cir. 1976); *Goins v. United States*, App. D.C., 353 A.2d 298 (1976); *Shanahan v. United States*, App. D.C., 354 A.2d 524 (1976); *Jackson v. United States*, App. D.C., 354 A.2d 869 (1976); *Williams v. United States*, App. D.C., 355 A.2d 784 (1976); *Thornton v. United States*, App. D.C., 357 A.2d 429, cert. denied, 429 U.S. 1024, 97 S. Ct. 644, 50 L. Ed. 2d 626 (1976); *White v. United States*, App. D.C., 358 A.2d 645 (1976); *Tibbs v. United States*, App. D.C., 359 A.2d 13 (1976); *Brown v. United States*, App. D.C., 359 A.2d 600 (1976); *Wright v. United States*, App. D.C., 360 A.2d 41 (1976); *Shepard v. United States*, App. D.C., 363 A.2d 291 (1976); *Cooper v. United States*, App. D.C., 363 A.2d 982 (1976); *Simmons v. United States*, App. D.C., 364 A.2d 813 (1976); *Boykins v. United States*, App. D.C., 366 A.2d 133 (1976); *Walden v. United States*, App. D.C., 366 A.2d 1075 (1976); *Fields v. United States*, App. D.C., 368 A.2d 537 (1977); *Jackson v. United States*, App. D.C., 368 A.2d 1140 (1977); *Woody v. United States*, App. D.C., 369 A.2d 592 (1977); *In re K.L.H.*, App. D.C., 372 A.2d 1003 (1977); *Harling v. United States*, App. D.C., 372 A.2d 1011 (1977); *Burkley v. United States*, App. D.C., 373 A.2d 878 (1977); *In re E.G.C.*, App. D.C., 373 A.2d 903 (1977); *McMillan v. United States*, App. D.C., 373 A.2d 912 (1977); *Jones v. United States*, App. D.C., 374 A.2d 854 (1977); *Jones v. United States*, App. D.C., 374 A.2d 854 (1977); *Graham v. United States*, App. D.C., 377 A.2d 1138 (1977), cert. denied, 434 U.S. 1022, 98 S. Ct. 748, 54 L. Ed. 2d 770 (1978); *Chatman v. United States*, App. D.C., 377 A.2d 1155 (1977); *Washington v. United States*, App. D.C., 377 A.2d 1348 (1977); *Heiligh v. United States*, App. D.C., 379 A.2d 689 (1977); *Watkins v. United States*, App. D.C., 379 A.2d 703 (1977); *Fraday v. United States Bureau of Prisons*, 570 F.2d 1027 (D.C. Cir. 1978); *United States v. Day*, 591 F.2d 861 (D.C. Cir. 1978); *Williams v. United States*, App. D.C., 382 A.2d 1 (1978); *Harling v. United States*, App. D.C., 382 A.2d 845 (1978); *Reed v. United States*, App. D.C., 383 A.2d 316, cert. denied, 439 U.S. 871, 99 S. Ct. 203, 58 L. Ed. 2d 183 (1978); *Allen v. United States*, App. D.C., 383 A.2d 363 (1978); *Singletary v. United States*, App. D.C., 383 A.2d 1064 (1978); *Cole v. United States*, App. D.C., 384 A.2d 651 (1978); *Patterson v. United States*, App. D.C., 384 A.2d 663 (1978); *United States v. Crews*, 445 U.S. 463, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980); *Williams v. United States*, App. D.C., 385 A.2d 760 (1978); *Wiggins v. United States*, App. D.C., 386 A.2d 1171 (1978); *Wright v. United States*, App. D.C., 387 A.2d 582 (1978); *Brown v. United States*, App. D.C., 387 A.2d 728 (1978); *Brown v. United States*, App. D.C., 388 A.2d 451 (1978); *Shelton v. United States*, App. D.C., 388 A.2d 859 (1978); *Cotton v. United States*, App. D.C., 388 A.2d 865 (1978); *Sinclair v. United States*, App. D.C., 388 A.2d 1201 (1978), cert. denied, 439 U.S. 1118, 99 S. Ct. 1026, 59 L. Ed. 2d 77 (1979); *Smith v. United States*, App. D.C., 389 A.2d 1356, cert. denied, 439 U.S. 1048, 99 S. Ct. 726, 58 L. Ed. 2d 707 (1978); *Smith v. United States*, App. D.C., 389 A.2d 1364 (1978); *In re D.A.S.*, App. D.C., 391 A.2d 255 (1978); *Shambley v. United States*, App. D.C., 391 A.2d 264 (1978); *Adair v. United States*, App. D.C., 391 A.2d 288 (1978); *Johnson v. United States*, App. D.C., 391 A.2d 1383 (1978); *Scott v. United States*, App. D.C., 392 A.2d 4 (1978); *Smith v. United States*, App. D.C., 392 A.2d 990 (1978); *Colter v. United States*, App. D.C., 392 A.2d 994 (1978); *Evans v. United States*, App. D.C., 392 A.2d 1015 (1978); *Peoples v. United States*, App. D.C., 395 A.2d 41 (1978), cert. denied, 442 U.S. 911, 99 S. Ct.

2826, 61 L. Ed. 2d 277 (1979); *Harvey v. United States*, App. D.C., 395 A.2d 92 (1978), cert. denied, 441 U.S. 936, 99 S. Ct. 2061, 60 L. Ed. 2d 665 (1979); *Fields v. United States*, App. D.C., 396 A.2d 522 (1978); *Fields v. United States*, App. D.C., 396 A.2d 990 (1979), cert. denied, 464 U.S. 998, 104 S. Ct. 497, 78 L. Ed. 2d 690 (1983); *Clark v. United States*, App. D.C., 396 A.2d 997 (1979); *Washington v. United States*, App. D.C., 397 A.2d 946 (1979); *Johnson v. United States*, App. D.C., 398 A.2d 354 (1979); *Vance v. United States*, App. D.C., 399 A.2d 52 (1979); *Coombs v. United States*, App. D.C., 399 A.2d 1313 (1979); *Bennett v. United States*, App. D.C., 400 A.2d 322 (1979); *In re L.D.O.*, App. D.C., 400 A.2d 1055 (1979); *Middleton v. United States*, App. D.C., 401 A.2d 109 (1979); *Lampkins v. United States*, App. D.C., 401 A.2d 966 (1979); *Devone v. United States*, App. D.C., 401 A.2d 971, cert. denied, 444 U.S. 876, 100 S. Ct. 160, 62 L. Ed. 2d 104 (1979); *Letsinger v. United States*, App. D.C., 402 A.2d 411 (1979); *Beck v. United States*, App. D.C., 402 A.2d 418 (1979); *Roberts v. United States*, App. D.C., 402 A.2d 441 (1979); *Smothers v. United States*, App. D.C., 403 A.2d 306 (1979); *Bates v. United States*, App. D.C., 403 A.2d 1159 (1979); *Washington v. United States*, App. D.C., 404 A.2d 197 (1979); *Jackson v. United States*, App. D.C., 404 A.2d 911 (1979); *Harrison v. United States*, App. D.C., 407 A.2d 683 (1979); *In re W.A.F.*, App. D.C., 407 A.2d 1062 (1979); *Hagans v. United States*, App. D.C., 408 A.2d 965 (1979); *Bean v. United States*, App. D.C., 409 A.2d 1064 (1979); *Jackson v. United States*, App. D.C., 420 A.2d 1202 (1979); *United States v. Crews*, 445 U.S. 463, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980); *United States v. Wood*, 628 F.2d 554 (D.C. Cir. 1980); *Bittle v. United States*, App. D.C., 410 A.2d 1383 (1980); *Rindgo v. United States*, App. D.C., 411 A.2d 373 (1980); *Fowler v. United States*, App. D.C., 411 A.2d 618, cert. denied, 446 U.S. 985, 100 S. Ct. 2967, 64 L. Ed. 2d 841 (1980); *Bridgeford v. United States*, App. D.C., 411 A.2d 633 (1980); *Williams v. United States*, App. D.C., 412 A.2d 17 (1980); *Cooper v. United States*, App. D.C., 415 A.2d 528 (1980); *Fitzhugh v. United States*, App. D.C., 415 A.2d 548 (1980); *Morton v. United States*, App. D.C., 415 A.2d 800 (1980); *Pegues v. United States*, App. D.C., 415 A.2d 1374 (1980); *Jones v. United States*, App. D.C., 416 A.2d 1236 (1980); *Wright v. United States*, App. D.C., 418 A.2d 146 (1980); *Bundy v. United States*, App. D.C., 422 A.2d 765 (1980); *Streater v. United States*, App. D.C., 429 A.2d 173 (1980), appeal dismissed and cert. denied, 451 U.S. 902, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981); *Cannon v. United States*, 645 F.2d 1128 (D.C. Cir. 1981); *United States v. Patterson*, 652 F.2d 1046 (D.C. Cir.), cert. denied, 454 U.S. 904, 102 S. Ct. 412, 70 L. Ed. 2d 223 (1981); *United States v.*

Garnett, 653 F.2d 558 (D.C. Cir. 1981); *Murphy v. United States*, 653 F.2d 637 (D.C. Cir. 1981); *United States v. Luck*, 664 F.2d 311 (D.C. Cir. 1981); *United States v. Leek*, 665 F.2d 383 (D.C. Cir. 1981); *Winestock v. United States*, App. D.C., 429 A.2d 519 (1981); *Clayton v. United States*, App. D.C., 429 A.2d 1381 (1981); *Lewis v. United States*, App. D.C., 430 A.2d 528, cert. denied, 454 U.S. 1081, 102 S. Ct. 635, 70 L. Ed. 2d 615 (1981); *In re Inquiry into Cedar Knoll Inst.*, App. D.C., 430 A.2d 1087 (1981); *Allen v. United States*, App. D.C., 431 A.2d 27 (1981); *Coligan v. United States*, App. D.C., 434 A.2d 483 (1981); *Asbell v. United States*, App. D.C., 436 A.2d 804 (1981); *Warren v. United States*, App. D.C., 436 A.2d 821 (1981); *Sweet v. United States*, App. D.C., 438 A.2d 447 (1981); *United States v. Green*, 680 F.2d 183 (D.C. Cir. 1982), cert. denied, 459 U.S. 1210, 103 S. Ct. 1204, 75 L. Ed. 2d 445 (1983); *Neal v. Director, D.C. Dep't of Cors.*, 684 F.2d 17 (D.C. Cir. 1982); *Jones v. United States*, App. D.C., 441 A.2d 1004 (1982); *Miller v. United States*, App. D.C., 444 A.2d 13 (1982); *Brooks v. United States*, App. D.C., 448 A.2d 253 (1982); *Watts v. United States*, App. D.C., 449 A.2d 308 (1982); *Sweet v. United States*, App. D.C., 449 A.2d 315 (1982); *Dobson v. United States*, App. D.C., 449 A.2d 1082 (1982), cert. denied, 464 U.S. 831, 104 S. Ct. 109, 78 L. Ed. 2d 111 (1983); *United States v. Jackson*, App. D.C., 450 A.2d 419 (1982); *Keitt v. United States*, App. D.C., 450 A.2d 461 (1982); *Parks v. United States*, App. D.C., 451 A.2d 591 (1982), cert. denied, 461 U.S. 945, 103 S. Ct. 2123, 77 L. Ed. 2d 1303 (1983); *Taylor v. United States*, App. D.C., 451 A.2d 859 (1982), cert. denied, 461 U.S. 936, 103 S. Ct. 2105, 77 L. Ed. 2d 311 (1983); *Jones v. United States*, App. D.C., 452 A.2d 1185 (1982); *Robinson v. United States*, App. D.C., 454 A.2d 810 (1982); *Powell v. United States*, App. D.C., 455 A.2d 405 (1982); *In re Q.L.J.*, App. D.C., 458 A.2d 30 (1982); *United States v. Singleton*, 702 F.2d 1159 (D.C. Cir. 1983); *Smith v. United States*, App. D.C., 454 A.2d 822 (1983); *Moore v. United States*, App. D.C., 457 A.2d 406 (1983); *Jefferson v. United States*, App. D.C., 463 A.2d 681 (1983); *Brown v. United States*, App. D.C., 464 A.2d 120 (1983); *Garris v. United States*, App. D.C., 465 A.2d 817 (1983), cert. denied, 465 U.S. 1012, 104 S. Ct. 1013, 79 L. Ed. 2d 243 (1984); *Adams v. United States*, App. D.C., 466 A.2d 439 (1983); *Fields v. United States*, App. D.C., 466 A.2d 822, cert. denied, 464 U.S. 998, 104 S. Ct. 497, 78 L. Ed. 2d 690 (1983); *Merriweather v. United States*, App. D.C., 466 A.2d 853 (1983); *Staton v. United States*, App. D.C., 466 A.2d 1245 (1983); *United States v. Venable*, 111 WLR 2241 (Super. Ct. 1983); *In re C.L.W.*, App. D.C., 467 A.2d 706 (1983); *Graves v. United States*, App. D.C., 467 A.2d 712 (1983); *Willis v. United States*, App. D.C., 468 A.2d 1320 (1983); *Pennington v. United States*, App. D.C., 471

A.2d 250 (1983); *Graves v. United States*, App. D.C., 472 A.2d 395, cert. denied, 469 U.S. 846, 105 S. Ct. 158, 83 L. Ed. 2d 95 (1984); *Ray v. United States*, App. D.C., 472 A.2d 854 (1984); *Boyd v. United States*, App. D.C., 473 A.2d 828 (1984); *Williams v. United States*, App. D.C., 481 A.2d 1303 (1984); *Jaggers v. United States*, App. D.C., 482 A.2d 786 (1984); *Douglas v. United States*, App. D.C., 488 A.2d 121 (1985); *Collins v. United States*, App. D.C., 491 A.2d 480 (1985), cert. denied, 475 U.S. 1124, 106 S. Ct. 1646, 90 L. Ed. 2d (1986); *In re A.H.B.*, App. D.C., 491 A.2d 490 (1985); *Smith v. United States*, App. D.C., 491 A.2d 1144 (1985); *Carter v. United States*, App. D.C., 497 A.2d 438 (1985); *Cox v. United States*, App. D.C., 498 A.2d 231 (1985); *Davis v. United States*, App. D.C., 498 A.2d 242 (1985); *Washington v. United States*, App. D.C., 499 A.2d 95 (1985); *In re C.B.N.*, App. D.C., 499 A.2d 1215 (1985); *Pryor v. United States*, App. D.C., 503 A.2d 678 (1986); *Hawthorne v. United States*, App. D.C., 504 A.2d 580, cert. denied, 479 U.S. 992, 107 S. Ct. 593, 93 L. Ed. 2d 594 (1986); *Jenkins v. United States*, App. D.C., 506 A.2d 1120, cert. denied, 479 U.S. 845, 107 S. Ct. 160, 93 L. Ed. 2d 99 (1986); *Black v. United States*, App. D.C., 506 A.2d 1130 (1986); *Saunders v. United States*, App. D.C., 508 A.2d 92 (1986); *Kirk v. United States*, App. D.C., 510 A.2d 499 (1986); *Arnold v. United States*, App. D.C., 511 A.2d 399 (1986); *United States v. Wright*, 114 WLR 1205 (Super. Ct.); *Brown v. United States*, App. D.C., 518 A.2d 415 (1986), cert. denied, 485 U.S. 978, 108 S. Ct. 1274, 99 L. Ed. 2d 485 (1988); *McKoy v. United States*, App. D.C., 518 A.2d 1013 (1986), cert. denied, 485 U.S. 907, 108 S. Ct. 1081, 99 L. Ed. 2d 240 (1988); *Settles v. United States*, App. D.C., 522 A.2d 348 (1987); *Stevenson v. United States*, App. D.C., 522 A.2d 1280 (1987); *Fletcher v. United States*, App. D.C., 524 A.2d 40 (1987); *In re M.R.*, App. D.C., 525 A.2d 614 (1987); *Bartley v. United States*, App. D.C., 530 A.2d 692 (1987); *Abrams v. United States*, App. D.C., 531 A.2d 964 (1987); *Hollingsworth v. United States*, App. D.C., 531 A.2d 973 (1987); *Waller v. United States*, App. D.C., 531 A.2d 994 (1987); *Haigler v. United States*, App. D.C., 531 A.2d 1236 (1987); *Easton v. United States*, App. D.C., 533 A.2d 904 (1987); *Shepard v. United States*, App. D.C., 533 A.2d 1278 (1987); *Gibson v. United States*, App. D.C., 536 A.2d 78 (1987); *Hall v. United States*, App. D.C., 540 A.2d 442 (1988); *Thomas v. United States*, App. D.C., 544 A.2d 1260 (1988); *Fields v. United States*, App. D.C., 547 A.2d 138 (1988); *Wesley v. United States*, App. D.C., 547 A.2d 1022 (1988); *Jenkins v. United States*, App. D.C., 548 A.2d 102 (1988); *Bellanger v. United States*, App. D.C., 548 A.2d 501 (1988); *Harris v. Ferguson*, 116 WLR 1981 (Super. Ct.); *Singley v. United States*, App. D.C., 548 A.2d 780 (1988); *Morris v. United States*, App. D.C., 548 A.2d 1383 (1988); *Sanders v. United States*, App. D.C., 550 A.2d 343 (1988); *Sturdivant v. United States*, App. D.C., 551 A.2d 1338 (1988), cert. denied, 493 U.S. 956, 110 S. Ct. 370, 107 L. Ed. 2d 356 (1989); *Spann v. United States*, App. D.C., 551 A.2d 1347 (1988); *Thomas v. United States*, App. D.C., 557 A.2d 599 (1989); *Dew v. United States*, App. D.C., 558 A.2d 1112 (1989); *Coates v. United States*, App. D.C., 558 A.2d 1148 (1989); *Garris v. United States*, App. D.C., 559 A.2d 323 (1989); *Landrum v. United States*, App. D.C., 559 A.2d 1323 (1989); *Johnson v. United States*, App. D.C., 562 A.2d 603 (1989); *Wright v. United States*, App. D.C., 564 A.2d 734 (1989); *Holt v. United States*, App. D.C., 565 A.2d 970 (1989); *Ramos v. United States*, App. D.C., 569 A.2d 158 (1990); *Nelson v. United States*, App. D.C., 580 A.2d 114 (1990); *Harper v. United States*, App. D.C., 582 A.2d 485 (1990); *Johnson v. United States*, App. D.C., 585 A.2d 766 (1991); *Russell v. United States*, App. D.C., 586 A.2d 695 (1991); *Vereen v. United States*, App. D.C., 587 A.2d 456 (1991); *Harris v. United States*, App. D.C., 594 A.2d 546 (1991); *Briggs v. United States*, App. D.C., 597 A.2d 370 (1991); *Mills v. United States*, App. D.C., 599 A.2d 775 (1991); *Nelson v. United States*, App. D.C., 601 A.2d 582 (1991); *Slye v. United States*, App. D.C., 602 A.2d 135 (1992); *Rambert v. United States*, App. D.C., 602 A.2d 1117 (1992); *Harris v. United States*, App. D.C., 606 A.2d 763 (1992); *Robinson v. United States*, App. D.C., 606 A.2d 1368 (1992); *Robinson v. United States*, App. D.C., 608 A.2d 115 (1992); *Tate v. United States*, App. D.C., 610 A.2d 237 (1992); *Bond v. United States*, App. D.C., 614 A.2d 892 (1992); *Coleman v. United States*, App. D.C., 619 A.2d 40 (1993); *Scott v. United States*, App. D.C., 619 A.2d 917 (1993); *Bates v. United States*, App. D.C., 619 A.2d 984 (1993); *Dickerson v. United States*, App. D.C., 620 A.2d 270 (1993); *Curington v. United States*, App. D.C., 621 A.2d 819 (1993); *Jackson v. United States*, App. D.C., 623 A.2d 571, cert. denied, — U.S. —, 114 S. Ct. 649, 126 L. Ed. 2d 607 (1993); *Culp v. United States*, App. D.C., 624 A.2d 460 (1993); *Everetts v. United States*, App. D.C., 627 A.2d 981 (1993), cert. denied, — U.S. —, 115 S. Ct. 144, 130 L. Ed. 2d 84 (1994); *Tibbs v. United States*, App. D.C., 628 A.2d 638 (1993); *Johnson v. United States*, App. D.C., 628 A.2d 1009 (1993); *Poole v. United States*, App. D.C., 630 A.2d 1109 (1993), cert. denied, — U.S. —, 115 S. Ct. 160, 130 L. Ed. 2d 98 (1994); *Butler v. United States*, App. D.C., 649 A.2d 563 (1994); *Kelly v. United States*, App. D.C., 639 A.2d 86 (1994); *Young v. United States*, App. D.C., 639 A.2d 92 (1994); *Ulmer v. United States*, App. D.C., 649 A.2d 295 (1994).

B. Other Offenses Distinguished.

Distinction between assault and larceny. — Assault and larceny are separate and distinct offenses requiring different elements of proof, one is a crime of general intent against the person and the other a crime of specific intent against property. *Mahoney v. United States*, App. D.C., 243 A.2d 684 (1968).

And between larceny and robbery. — While larceny remains an offense against possession, robbery is basically a crime against the person. *United States v. Dixon*, 469 F.2d 940 (D.C. Cir. 1972).

Larceny is a necessarily included offense of robbery. *Walker v. United States*, 418 F.2d 1116 (D.C. Cir. 1969); *Ulmer v. United States*, App. D.C., 649 A.2d 295 (1994).

And petit larceny is lesser included offense of robbery. *Dublin v. United States*, App. D.C., 388 A.2d 461 (1978).

Distinction between robbery and theft. — A robbery would still exist, as opposed to theft, even though the victim was either dead or unconscious at the time defendant decided to take his property. *Ulmer v. United States*, App. D.C., 649 A.2d 295 (1994).

Assault not lesser included offense of robbery in subsequent altercation. — Simple assault in taking bag of money (although promptly returning it) in the original encounter, was not a lesser included offense of the robbery charged in delinquency petition, which was the taking of the bag of money in a subsequent altercation by force and violence, against resistance and by putting in fear, as that taking was factually and legally distinct from the defendant's taking the bag of money (although promptly returning it) in the original encounter. *In re D.B.H.*, App. D.C., 549 A.2d 351 (1988).

Robbery and assault with dangerous weapon are lesser included offenses of armed robbery. *Franey v. United States*, App. D.C., 382 A.2d 1019 (1978).

Robbery is lesser included offense of armed robbery. *Anderson v. United States*, App. D.C., 490 A.2d 1127 (1985).

Carrying of dangerous weapon and armed robbery not properly joined. — The gravamen of the offense of armed robbery is that something is taken from a person by force, while the crime of carrying a dangerous weapon is essentially a crime of possession, designed to keep such dangerous items off the street; the basic natures of the offenses are thus dissimilar and could not properly be joined under Super. Ct. Crim. R. 8. *Roper v. United States*, App. D.C., 564 A.2d 726 (1989).

Similarity to unauthorized use of vehicle. — An analysis of the elements of unauthorized use of a motor vehicle and robbery shows that the requisite degree of similarity exists

between them for joinder under Superior Court Criminal Rule 8(a). *Gooch v. United States*, App. D.C., 609 A.2d 259 (1992).

Assault with a dangerous weapon is a lesser included offense of armed robbery. *United States v. Johnson*, 475 F.2d 1297 (D.C. Cir. 1973); *United States v. McKinley*, 485 F.2d 1059 (D.C. Cir. 1973); *United States v. Lee*, 509 F.2d 400 (D.C. Cir. 1974), cert. denied, 420 U.S. 1006, 95 S. Ct. 1451, 43 L. Ed. 2d 765 (1975); *Harling v. United States*, App. D.C., 460 A.2d 571 (1983).

Assault with a dangerous weapon is a lesser included offense of robbery while armed and the 2 offenses merge when they both arise out of the same act of the defendant. *Leftwitch v. United States*, App. D.C., 460 A.2d 993 (1983).

Assault with a dangerous weapon is a lesser included offense of armed robbery because all of the elements of assault with a dangerous weapon are included in armed robbery. *Norris v. United States*, App. D.C., 585 A.2d 1372 (1991).

Assault with a dangerous weapon is a lesser included offense of armed robbery and when the former is committed in order to effect the latter, the conviction for assault with a dangerous weapon merges into the conviction for armed robbery. *Norris v. United States*, App. D.C., 585 A.2d 1372 (1991).

And counts merge. — A count charging assault with a dangerous weapon is merged with a count charging armed robbery. *Smith v. United States*, App. D.C., 312 A.2d 781 (1973).

Merger of second degree murder and armed robbery. — Convictions for second degree murder while armed and armed robbery were vacated, as they had merged with the conviction for felony murder while armed. *Gresham v. United States*, App. D.C., 654 A.2d 871, cert. denied, — U.S. —, 116 S. Ct. 155, 133 L. Ed. 2d 99 (1995).

Assault with a dangerous weapon and armed robbery triggered by separate acts. — Where assault with a dangerous weapon and armed robbery are triggered by separate acts, merger is precluded but in order to separate the charges, the defendant must have completed one crime and have begun another. *Norris v. United States*, App. D.C., 585 A.2d 1372 (1991).

Foreseeability that weapon would be required. — The natural and probable consequence of the alleged accomplice's actions would not lead to complicity with an armed offense, unless the accused could reasonably foresee a weapon would be required. *Ingram v. United States*, App. D.C., 592 A.2d 992, cert. denied, 502 U.S. 1017, 112 S. Ct. 667, 116 L. Ed. 2d 757 (1991).

But assault with a dangerous weapon is offense not necessarily included in robbery. *Crosby v. United States*, 339 F.2d 743 (D.C. Cir. 1964).

Armed robbery and assault with a dangerous weapon merge where both offenses are committed against the same victim as part of the same criminal incident. *Morris v. United States*, App. D.C., 622 A.2d 1116, cert. denied, — U.S. —, 114 S. Ct. 270, 126 L. Ed. 2d 221 (1993).

Robbery and assault with dangerous weapon require proof of different facts. — Separate consecutive sentences of 18 months to five years for robbery, and one to three years for assault with a dangerous weapon did not violate the Double Jeopardy Clause of the Fifth Amendment since conviction of each offense requires proof of a fact which the other does not. *Floyd v. United States*, App. D.C., 538 A.2d 248 (1988).

First degree burglary while armed count did not merge with armed robbery, kidnapping, or assault with dangerous weapon counts because burglary requires proof of an element (entry into a dwelling with criminal intent) that the other first incident crimes do not. Kidnaping (victim was seized or detained), armed robbery (property of value was taken), and assault with a dangerous weapon (forceful or violent attempt to inflict bodily harm) all require proof of elements that burglary does not. *Hanna v. United States*, 666 A.2d 845 (D.C. App. 1995).

Burglary, premeditated murder and robbery convictions did not merge as “one continuous criminal act.” *Bennett v. United States*, App. D.C., 620 A.2d 1342 (1993).

Armed robbery and felony murder merge. — Conviction for armed robbery merges with felony murder conviction. *Ulmer v. United States*, App. D.C., 649 A.2d 295 (1994).

Possessing prohibited weapon under § 22-3214 is not lesser included offense of armed robbery. *Washington v. United States*, App. D.C., 366 A.2d 457 (1976).

Lesser offense of entry with intent to rob merges into completed bank robbery when the latter offense is proved. *Bryant v. United States*, 417 F.2d 555 (D.C. Cir. 1969); *Marshall v. United States*, 436 F.2d 155 (D.C. Cir. 1970).

Kidnapping charges merged with the robbery charges because the movements and detentions of the victims were merely incidental to the commission of the robbery. *Vines v. United States*, App. D.C., 540 A.2d 1107 (1988).

Kidnapping did not merge with robbery. — Kidnapping count did not merge with armed robbery count, despite the fact that one person was the victim of both counts, because the two crimes have different elements. *Hanna v. United States*, 666 A.2d 845 (D.C. App. 1995).

Armed robbery committed after burglary is an offense separate and distinct from burglary. *Strickland v. United States*,

App. D.C., 332 A.2d 746, cert. denied, 423 U.S. 846, 96 S. Ct. 84, 46 L. Ed. 2d 67 (1975).

Unauthorized use of vehicle and robbery convictions did not merge. — Conviction for unauthorized use of a vehicle did not merge with a robbery conviction, and a theft conviction did not merge with a burglary conviction, as each conviction required a different element of proof. *Matthews v. United States*, App. D.C., 629 A.2d 1185 (1993).

Housebreaking and robbery are independent crimes. *Irby v. United States*, 250 F. Supp. 983 (D.D.C. 1965), aff’d, 390 F.2d 432 (D.C. Cir. 1967).

Government may charge both federal and local offenses. — The government may charge in the same indictment offenses against both the federal bank robbery statute and this section. *United States v. Shepard*, 515 F.2d 1324 (D.C. Cir. 1975).

But successive prosecutions for same robbery unconstitutional. — The double jeopardy clause prohibits successive prosecutions in the District for violations of federal and local law arising from the same robbery, but it does not require that a prosecution under the federal scheme be preferred to a prosecution under local statutes, so long as only a single prosecution takes place. *United States v. Shepard*, 515 F.2d 1324 (D.C. Cir. 1975).

Consecutive sentences for armed robbery and assault with intent to kill. — Where, during the course of a robbery, defendant shot one of his robbery victims, and was convicted of both the armed robbery of his victim under this section and § 22-3202 and assault with intent to kill while armed under §§ 22-501 and 22-3202, separate, consecutive sentences for the 2 convictions were not precluded by the merger doctrine. *Taylor v. United States*, App. D.C., 508 A.2d 99 (1986).

II. ELEMENTS.

A. In General.

Section does not set forth all the essential elements of the offense. *Byrd v. United States*, 342 F.2d 939 (D.C. Cir. 1965).

“Robbery” defined. — Congress meant to make robbery a crime, and by “robbery” it meant robbery in the usual common law sense of the term, except as expanded by this section. *Neufield v. United States*, 118 F.2d 375 (D.C. Cir. 1941), cert. denied, 315 U.S. 798, 62 S. Ct. 580, 86 L. Ed. 1199 (1942).

“Robbery,” as used in this section, means robbery in the usual common law sense, as expanded to include a sudden or stealthy seizure or snatching. *United States v. Mann*, 119 F. Supp. 406 (D.D.C. 1954).

Elements of offense. — In the District, robbery retains its common law elements, modified only to the extent that Congress has en-

larged it to encompass stealthy as well as forcible takings. *Irby v. United States*, 250 F. Supp. 983 (D.D.C. 1965), *aff'd*, 390 F.2d 432 (D.C. Cir. 1967).

Elements of proof required for conviction of armed robbery. — A robbery conviction requires proof of a taking from the person of another by a sudden or stealthy seizure or snatching, or by putting him in fear. *Hunt v. United States*, 316 F.2d 652 (D.C. Cir. 1963).

Under an indictment for robbery, the government must prove assault and larceny. *United States v. McGill*, 487 F.2d 1208 (D.C. Cir. 1973).

The government must prove assault and larceny under a robbery indictment. *Day v. United States*, App. D.C., 390 A.2d 957 (1978), *rev'd* on other grounds *sub nom.* *Graves v. United States*, App. D.C., 490 A.2d 1086 (1984).

A conviction for armed robbery requires a showing of a taking of property of value while armed from the immediate actual possession of another against his will by force or violence or by putting in fear. *Head v. United States*, App. D.C., 451 A.2d 615 (1982).

Armed robbery charge requires proof of the taking of something of value, but assault charge does not require proof of any element not required in the armed robbery charge. *Simms v. United States*, App. D.C., 634 A.2d 442 (1993).

Requirement of force satisfied by physical taking of property. — The requirement for force is satisfied within the sense of this section by an actual physical taking of the property from the person of another even without his knowledge and consent, and though the property is unattached to his person. *Turner v. United States*, 16 F.2d 535 (D.C. Cir. 1926).

The force used to remove property from a victim's pocket is sufficient "force or violence" within the meaning of this section. *Spencer v. United States*, 116 F.2d 801 (D.C. Cir. 1940).

A defendant may be convicted of a crime requiring proof of "force or violence" when the only force used is that necessary to lift a wallet from a pocket. *United States v. Mathis*, 963 F.2d 399 (D.C. Cir. 1992).

"Robbery" includes stealthy seizure. — The purpose of Congress in enacting this section was to expand the common law definition of "robbery" so that it would comprehend a taking by sudden or stealthy seizure or snatching. *Neufeld v. United States*, 118 F.2d 375 (D.C. Cir. 1941), *cert. denied*, 315 U.S. 798, 62 S. Ct. 580, 86 L. Ed. 1199 (1942).

And picking pockets. — The legislative history of this section evinces a congressional intent to include picking pockets and like crimes within the rubric of "robbery" by inserting the language by "by sudden or stealthy seizure or snatching" in the section. *Hawkins v. United States*, App. D.C., 399 A.2d 1306 (1979).

Robbery can involve merely stealthy seizure. *Day v. United States*, App. D.C., 390 A.2d 957 (1978), *rev'd* on other grounds *sub nom.* *Graves v. United States*, App. D.C., 490 A.2d 1086 (1984).

Picking pockets difficult of proof. — Picking pockets, or "robbery by stealth," is a crime which, by its very nature, is difficult of proof. *Davis v. United States*, 433 F.2d 1222 (D.C. Cir. 1970).

Government need not establish that victim unafraid before robber approached. —

To establish the element of putting in fear, the government need not establish that the victim was not in a state of fear before the robber approached. *Dublin v. United States*, App. D.C., 388 A.2d 461 (1978).

Robbery not finished until robbers accomplish getaway. — Robbery is not finished until the robbers accomplish by force of arms their getaway with the loot. *Jordan v. United States*, App. D.C., 350 A.2d 735 (1976).

Dead victim "person" for purposes of robbery. — The victim of a homicide, even though dead, is a "person" within the meaning of this section where the time interval between the killing and the taking is short. *Carey v. United States*, 296 F.2d 422 (D.C. Cir. 1961).

There can be a robbery even if the victim is dead before property is taken. *United States v. Butler*, 455 F.2d 1338 (D.C. Cir. 1971).

Victim's knowledge of theft not necessary for conviction. — Under this section a conviction for robbery may be had even though the victim did not have knowledge of the theft at the time. *Spencer v. United States*, 116 F.2d 801 (D.C. Cir. 1940).

Victim need not be ignorant of robbery by stealth. — This section does not require the victim of a robbery by stealth to be ignorant of the fact that he is being robbed. *Noaks v. United States*, App. D.C., 486 A.2d 1177 (1985).

Nor is intent to commit other crime. — There is no statutory requirement for either robbery or assault with a dangerous weapon that there be a specific intent to commit the other. *United States v. Suggs*, 269 F. Supp. 732 (D.D.C. 1967).

Nor proof of ownership. — Proof of the ownership of the stolen property is not required to sustain a conviction of robbery. *Jones v. United States*, App. D.C., 362 A.2d 718 (1976).

Person assaulted need not be same individual assailant intended to rob to support an assault conviction under § 22-501. *Moore v. United States*, App. D.C., 508 A.2d 924 (1986).

Identity of perpetrator not technically element of offense. — The identity of the perpetrator of an offense, though an indispensable item of proof by the government, is not considered an "element" of the crime. *United States v. Johnson*, 589 F.2d 716 (D.C. Cir. 1978).

Presence which will support conviction as aider and abettor. — Although mere presence at the scene of a crime will not sustain a conviction as an aider and abettor, presence which designedly encourages the perpetrator, facilitates the unlawful deed or stimulates others to render assistance to the criminal act will support a conviction. *Johnson v. United States*, App. D.C., 434 A.2d 415 (1981).

Liability for crime committed by principal. — One need not necessarily have intended the particular crime which was committed by the principal in order to be liable for what occurred. *Johnson v. United States*, App. D.C., 434 A.2d 415 (1981).

Driver of getaway car is principal as aider and abettor, not accessory. — Defendant who drove the car containing codefendant attempting to escape from scene of robbery was not an accessory after the fact because the robbery was still in progress but, rather, would be a principal as aider and abettor, if anything, so that conviction as accessory after the fact must be reversed. *Williams v. United States*, App. D.C., 478 A.2d 1101 (1984).

B. Possession.

Property in robbery must belong to other person. — Although this section does not express the elements of common law robbery, it includes the common law element that the property shall belong to some one other than the robber. *Neufield v. United States*, 118 F.2d 375 (D.C. Cir. 1941), cert. denied, 315 U.S. 798, 62 S. Ct. 580, 86 L. Ed. 1199 (1942).

And must be in victim's possession. — In a robbery prosecution of a pickpocket, the evidence must be sufficient to permit the jury to conclude beyond a reasonable doubt that the defendant gained possession from the immediate actual possession of the victim. *Davis v. United States*, 433 F.2d 1222 (D.C. Cir. 1970).

The victim must be in immediate actual possession of the property at the time of the taking for conviction of robbery. *Rouse v. United States*, App. D.C., 402 A.2d 1218 (1979).

In robbery, the property taken must have been within the victim's immediate actual possession. *Rease v. United States*, App. D.C., 403 A.2d 322 (1979).

Under this section, if the actions of the accused are responsible for depriving the victim of immediate actual possession, then the jury can properly find the accused guilty of robbery. *Rouse v. United States*, App. D.C., 402 A.2d 1218 (1979).

"Possession" defined. — The word "possession" in this section is not used in a strict larcenous sense, but is used in a colloquial sense, meaning nothing more than custody or control. *Neufield v. United States*, 118 F.2d 375

(D.C. Cir. 1941), cert. denied, 315 U.S. 798, 62 S. Ct. 580, 86 L. Ed. 1199 (1942).

"Possession," as used in this section, does not mean strict legal ownership, but rather "custody or control" in a colloquial sense. *United States v. Dixon*, 469 F.2d 940 (D.C. Cir. 1972).

"Immediate actual possession" defined. — "Immediate actual possession," within the meaning of this section, refers to an area within which the victim can reasonably be expected to exercise some physical control over his property. *Spencer v. United States*, 116 F.2d 801 (D.C. Cir. 1940); *Head v. United States*, App. D.C., 451 A.2d 615 (1982).

A thing is within one's "immediate actual possession" for purposes of this section so long as it is within such a range that a person could, if not deterred by violence or fear, retain actual physical control over it. *United States v. Dixon*, 469 F.2d 940 (D.C. Cir. 1972).

Evidence sufficient to establish possessory element. — Evidence that the money in a cash register was taken from a sales clerk is sufficient to establish the possessory element of the offense of armed robbery. *Jones v. United States*, App. D.C., 362 A.2d 718 (1976).

C. Intent.

Specific intent element of offense. — Robbery requires a specific intent to deprive the victim of his property. *Jackson v. United States*, 348 F.2d 772 (D.C. Cir. 1965).

Intent to steal is a material element of the offense of robbery. *United States v. Robinson*, 475 F.2d 376 (D.C. Cir. 1973).

Although this section does not mention specific intent, it must be read as referring to the common law crime of robbery, of which a necessary element is specific intent to take the property of another. *United States v. Owens*, App. D.C., 332 A.2d 752 (1975).

Specific intent is a necessary element of robbery or armed robbery. *Johnson v. United States*, App. D.C., 360 A.2d 502 (1976).

Voluntary narcosis can negate specific intent. *United States v. Richardson*, 459 F.2d 1133 (D.C. Cir. 1972).

Voluntary narcosis can negate specific intent to commit the robbery. *United States v. Shepard*, 515 F.2d 1324 (D.C. Cir. 1975).

Defendant may be too drunk to form the requisite intent to rob. *Womack v. United States*, 336 F.2d 959 (D.C. Cir. 1964).

And urine test may convince jury. — A urine test may convince the jury that the defendant, as a result of intoxication, did not have the requisite intent to commit robbery. *United States v. Butler*, 499 F.2d 1006 (D.C. Cir. 1974).

Intent of accomplice. — Accomplice did not knowingly and intentionally aid and abet in an armed robbery where principal did not decide to rob victim until after both men had arrived

at the scene of the crime. *Roy v. United States*, App. D.C., 652 A.2d 1098 (1995).

III. PROCEDURE.

A. In General.

No absolute right to plea bargain. — As respects a charge of robbery, there is no absolute right to plea bargain. *Smith v. United States*, App. D.C., 356 A.2d 650 (1976).

Absent detriment, constitutional for defense counsel to enter appearance for other defendants. — The defendant is not deprived of effective assistance of counsel because his counsel enters an appearance for other defendants who are charged with the same robbery where no conflict of interests or detriment appears. *Wynn v. United States*, 275 F.2d 648 (D.C. Cir. 1960).

Speedy trial right not impinged by unintentional and unprejudicial delay. — The right to a speedy trial of a defendant charged with robbery is not impinged where defendant is still at large and, police are doing their best to locate him, where the defendant, does not press a speedy trial right after he is arrested, and where he suffers no prejudice to his defense. *United States v. Parish*, 468 F.2d 1129 (D.C. Cir. 1972), cert. denied, 410 U.S. 957, 93 S. Ct. 1430, 35 L. Ed. 2d 690 (1973).

Court may refuse to exclude Catholics from jury of priest robber. — The court may refuse to grant a motion of a defendant charged with robbing a priest to exclude all Catholics from jury. *Coleman v. United States*, App. D.C., 379 A.2d 951 (1977).

And refusing street clothes attire before jury harmless where evidence overwhelming. — Where there is overwhelming evidence to show that the defendant committed the robbery, an error in refusing him permission to change into street clothes before the voir dire of the jury array is begun is harmless. *Fernandez v. United States*, App. D.C., 375 A.2d 484 (1977).

Joinder of similar or connected offenses proper. — The crimes of robbery and of attempted robbery are similar in nature and their joinder in an indictment is permissible. *Drew v. United States*, 331 F.2d 85 (D.C. Cir. 1964).

Where various offenses, including robbery, are based on 2 or more connected acts constituting part of a common scheme and plan, the defendants participate in these acts, and each aids and abets each of the offenses, it is proper to join the defendants and the offenses in the indictment. *United States v. Wilson*, 434 F.2d 494 (D.C. Cir. 1970).

Where the similarity of circumstances surrounding 2 criminal episodes on which charges of rape and robbery are based are sufficiently remarkable to prove that there is a reasonable probability that the same person committed

both crimes, there is no prejudice in joinder. *United States v. Adams*, 481 F.2d 1099 (D.C. Cir. 1973).

No reversal for joinder of defendants where independent evidence of guilt overwhelming. — Where the defendant and a codefendant have antagonistic defenses to a robbery charge, but where the independent evidence of the defendant's guilt is overwhelming and the conflict in itself creates no danger that the jury will unjustifiably infer the defendant's guilt, any possible prejudice which may result from a joint trial is not such as to warrant reversal. *Clark v. United States*, App. D.C., 367 A.2d 158 (1976).

Joinder of unconnected offenses improper. — Where there is no evidence of a common scheme or plan embracing the commission of all of several offenses, including robbery, it is prejudicial error to join the trial of the charges. *United States v. Carter*, 475 F.2d 349 (D.C. Cir. 1973).

Mere temporal and spacial proximity cannot justify characterization of an assault and a robbery as different parts of the same series of acts or transactions and joinder is improper. *United States v. Jackson*, 562 F.2d 789 (D.C. Cir. 1977).

Refusal to sever separate robberies prejudicial. — The refusal to grant a severance for trial purposes as to a defendant tried for several crimes arising out of separate robberies is prejudicial, because there is the danger that the evidence with respect to the robberies will cumulate in the juror's minds and tend to prove the defendant guilty of each. *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966).

And conflicting and irreconcilable defenses require a severance of joint defendants. *United States v. Wilson*, 434 F.2d 494 (D.C. Cir. 1970).

Where count dismissed for failure of proof, prior refusal to sever not prejudicial. — Where a count of an indictment is dismissed for failure of proof before the case is submitted to the jury and the indictment is retyped, the defendant was not prejudiced by a refusal to sever the count from a count charging robbery. *United States v. Joyner*, 492 F.2d 650 (D.C. Cir.), cert. denied, 419 U.S. 852, 95 S. Ct. 94, 42 L. Ed. 2d 83 (1974).

Court may refuse to sever connected offenses. — Where a petition charges armed robbery of one person and attempted armed robbery and felony murder of another, and where the offenses were committed, at approximately the same place, within minutes of each other, and were similar and involved a great deal of overlapping evidence, and where the defendant makes no convincing showing that he has important testimony concerning one count and has a strong need to refrain from testifying on the other, the court does not abuse

its discretion in refusing to sever the offenses. In re F.D.P., App. D.C., 352 A.2d 378 (1976).

Where a robbery and a felony murder, although unrelated as to place, where so closely related in time as to almost constitute a continuing transaction, and evidence of the robbery would be admissible in a separate trial for the felony murder, court does not abuse its discretion in denying a severance of the counts. Calhoun v. United States, App. D.C., 369 A.2d 605 (1977).

In a prosecution for numerous offenses, including robbery, the court may refuse to sever the counts on the basis of the separate dates of the alleged offenses, in view of the fact that all the offenses flowed each from the other, evidence of each would be admissible in separate trials to show motive, intent and identity and evidence as to each offense is simple and direct. Horton v. United States, App. D.C., 377 A.2d 390 (1977).

As well as defendants where evidence substantial and jury properly instructed. — The refusal to grant a severance in a prosecution for robbery is not prejudicial due to the fact that evidence placing a codefendant at the scene of the crime is quantitatively and qualitatively greater than evidence against the defendant where evidence against defendant is both substantial and compelling and the jury is specifically instructed to determine the guilt of each defendant by considering only his own conduct and evidence which applied to him. United States v. Leonard, 494 F.2d 955 (D.C. Cir. 1974).

And where no indication that codefendant willing to testify for defendant. — A severance is not required on the ground that the defendant can call his codefendant to testify that they were not together when the robbery occurred where there is no indication that the codefendant would be willing to testify. United States v. Bolden, 514 F.2d 1301 (D.C. Cir. 1975).

Following examination, court not required to direct further hearing on competency. — Where a pretrial examination results in a certification of competency and the court, after a hearing, reaches a like result, the judge is not required to direct, sua sponte, a further hearing on competency in a prosecution for robbery. United States v. Tremble, 470 F.2d 1272 (D.C. Cir. 1972).

Court assumes unadvised defendant who pleads guilty ignorant of rights. — In determining whether an alleged plea of guilty at a preliminary hearing is admissible, the court is required to assume that the defendant who was not asked whether he wanted counsel or informed regarding the privilege against self-incrimination did not know his rights and did not intend to waive them. Wood v. United States, 128 F.2d 265 (D.C. Cir. 1942).

Continuation of trial after codefendant's guilty plea constitutional. — The continuation of a robbery trial after a codefendant changes his plea to guilty does not constitute a denial of due process. Scott v. United States, 419 F.2d 264 (D.C. Cir. 1969).

But court required to explain codefendant's absence. — The court is required to make some explanation concerning the sudden absence of a codefendant who pleads guilty from the trial. United States v. Harris, 437 F.2d 686 (D.C. Cir. 1970).

Acts of accomplice imputed to defendant. — Even assuming the defendant used no weapon, the acts of his accomplice can be imputed to him, thus making him chargeable as a principal. Jordan v. United States, App. D.C., 350 A.2d 735 (1976).

Denying withdrawal of plea allowed where no legal defense or unfairness. — The court does not abuse its discretion in denying motion to withdraw a guilty plea prior to sentencing where ground for the motion does not constitute a legal offense defense to robbery and there is no charge of unfairness or deception. Jordan v. United States, App. D.C., 350 A.2d 735 (1976).

Court's actions not opinions, nor influential on verdict. — In a trial for robbery, the actions of the court should not be interpreted as opinions and, even if so interpreted, they should not influence the jury's verdict. Clifton v. United States, App. D.C., 363 A.2d 299 (1976).

Judge's unrevealed manifestations of disbelief of witness not prejudicial. — In a proceeding in which an accused is charged with robbery, the judge's facial expressions and other outward manifestations of disbelief of a defense witness do not prejudice the accused where the judge turns away so as to avoid revealing his reaction. Dyas v. United States, App. D.C., 376 A.2d 827, cert. denied, 434 U.S. 973, 98 S. Ct. 529, 54 L. Ed. 2d 464 (1977).

Neither is failure to disclose discussion in chambers. — In a prosecution for robbery, the failure to timely disclose to all counsel a discussion between the complaining witness and the judge in chambers concerning an alleged racial slur made by one of the defense counsel to another is error, but is not prejudicial. Clifton v. United States, App. D.C., 363 A.2d 299 (1976).

B. Arrest; Search and Seizure.

Probable cause to arrest. — The victim's physical condition and his positive identification of the defendant as a participant in the robbery are sufficient for probable cause to arrest. Pendergrast v. United States, 416 F.2d 776 (D.C. Cir.), cert. denied, 395 U.S. 926, 89 S. Ct. 1782, 23 L. Ed. 2d 243 (1969).

Evidence disclosing that shortly after an ar-

rest for a firearm's violation a police officer determined that the defendant fits the lookout for an earlier robbery establishes probable cause to detain for robbery. *Young v. United States*, 435 F.2d 405 (D.C. Cir. 1970).

Where the defendant is hiding not far from the scene of a robbery, a few minutes after the robbery, and makes no response to inquiries, a police officer has probable cause to arrest. *Marshall v. United States*, 436 F.2d 155 (D.C. Cir. 1970).

Where the defendant, in response to an investigatory stop by a police officer who saw the defendant fleeing from the direction of a robbery, voluntarily enters the officer's car and states that he is tired of running, the officer has necessary cause to arrest the defendant. *United States v. Hines*, 455 F.2d 1317 (D.C. Cir. 1971), cert. denied, 406 U.S. 975, 92 S. Ct. 2427, 32 L. Ed. 2d 675 (1972).

The police may make a warrantless arrest even though the sum total of information available to the officers comes from an unidentified victim of an undisclosed robbery. *Bates v. United States*, App. D.C., 327 A.2d 542 (1974).

A police officer who spots the defendant while proceeding to the scene of the robbery and who obtains a description of the robber which fits the defendant has probable cause to arrest without a warrant. *Randall v. United States*, App. D.C., 353 A.2d 12 (1976).

The strong correlation between appellant's appearance and the description possessed by the arresting officer, together with appellant's proximity to the crime scene and his behavior when confronted with a police order to halt, may tip the scales in favor of probable cause. In re E.G., App. D.C., 482 A.2d 1243 (1984).

Hearing on validity of arrest unwarranted where informant's reliability established. — Allegations of lack of probable cause for arrest because of the unreliability of the informant are not sufficient to warrant a hearing on that issue where the informant's reliability has been established at a hearing in a related case. *Cooper v. United States*, 331 F.2d 776 (D.C. Cir. 1963), cert. denied, 379 U.S. 865, 85 S. Ct. 131, 13 L. Ed. 2d 68 (1964).

Warrantless entry proper when magistrate unavailable. — The police may make a warrantless, unconsented, nonforceable entry into a home late in the evening some few hours after an armed robbery and within an hour after they obtain eyewitness identification when a magistrate is not readily available. *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970).

Forced entry without notice proper where announcement useless gesture. — Where it would be a useless gesture for police officers to announce the purpose of their entry, a forced entry for arrest without notice of au-

thority is proper. *United States v. Wylie*, 462 F.2d 1178 (D.C. Cir. 1972).

Seizure of stolen articles in "plain view" of the arresting officers is proper. *United States v. Miller*, 449 F.2d 974 (D.C. Cir. 1970).

Police officers can seize the fruits, instrumentalities or evidence of a robbery that they recognize to be of importance to the prosecution of the arrestee if the items involved are in plain view when they enter the premises to make the arrest. *United States v. Harris*, 435 F.2d 74 (D.C. Cir. 1970), cert. denied, 402 U.S. 986, 91 S. Ct. 1675, 29 L. Ed. 2d 152 (1971).

Defendant must provide evidence of privacy interest in article searched and seized. — The mere fact that the police searched and seized a briefcase does not establish that the police thereby infringed defendant's Fourth Amendment rights. Defendant must provide evidence that he had a protectable privacy interest in the briefcase. *Austin v. United States*, App. D.C., 433 A.2d 1081 (1981).

Evidence of robbery seized as the result of a reasonable search is admissible. *United States v. Williams*, 454 F.2d 1016 (D.C. Cir. 1971).

Police should retain stolen article for fingerprint analysis. — The police, after a purse snatching, should not return it to the complaining witness, but should retain it for fingerprint analysis. *Marshall v. United States*, App. D.C., 340 A.2d 805 (1975).

Weapon seized from arrestee's automobile not suppressed. — In a prosecution for robbery, the defendant is not entitled to the suppression of a weapon taken from his automobile after his arrest. *Bennett v. United States*, 249 F.2d 505 (D.C. Cir. 1957).

C. Indictment.

Indictment should state offense precisely. — A robbery indictment should state the offense charged more precisely than by setting forth the statutory language. *Jackson v. United States*, 348 F.2d 772 (D.C. Cir. 1965).

Indictment charging violation of this section and § 22-3202 held sufficient. — A 1-count indictment purporting to charge armed robbery in violation of this section and § 22-3202 sufficiently apprised the defendant of the charge against him despite its failure to employ the statutory language regarding "force or violence" or "putting in fear." *United States v. Bradford*, App. D.C., 482 A.2d 430 (1984).

Ownership of property need be alleged in the indictment only to show that it was in someone else other than the accused and to describe the property taken. *United States v. Mann*, 119 F. Supp. 406 (D.D.C. 1954).

Use of the word "stole" in the indictment puts the defendant on notice that specific

intent is an element of the crime. *United States v. Owens*, App. D.C., 332 A.2d 752 (1975).

And omission of "stealthy seizure" language does not warrant reversal. — The omission from a robbery indictment that the property was taken by a "sudden or stealthy seizure or snatching" does not warrant a reversal, absent a denial of a substantial right. *Jackson v. United States*, 359 F.2d 260 (D.C. Cir.), cert. denied, 385 U.S. 877, 87 S. Ct. 157, 17 L. Ed. 2d 104 (1966).

Government entitled to charge separate assaults against bystanders. — In a robbery case, the government has the right to charge, as separate assaults, assaults against bystanders who are not robbed. *Sutton v. United States*, 434 F.2d 462 (D.C. Cir. 1970), cert. denied, 402 U.S. 988, 91 S. Ct. 1676, 29 L. Ed. 2d 153 (1971).

Merger. — Blow to victim's head was done to effectuate the in-progress armed robbery, not under a "fresh impulse"; convictions for assault with dangerous weapon and armed robbery merged. *Simms v. United States*, App. D.C., 634 A.2d 442 (1993).

Robbery of store and employee involves distinct offenses. — Where, during the course of a robbery, the defendant robs the property of the store and robs a store employee of his own property, the episode is not a unitary transaction but involves distinct offenses. *United States v. Diggs*, 522 F.2d 1310 (D.C. Cir. 1975), cert. denied, 429 U.S. 852, 97 S. Ct. 144, 50 L. Ed. 2d 127 (1976).

No reversal for variance between indictment and proof where no objection nor prejudice. — A robbery conviction will not be reversed on the grounds there was a variance between the indictment and the proof where there was no objection to the introduction of the variant evidence and there is no showing or claim of actual prejudice. *Jackson v. United States*, 359 F.2d 260 (D.C. Cir.), cert. denied, 385 U.S. 877, 87 S. Ct. 157, 17 L. Ed. 2d 104 (1966).

Failure to sever armed robbery and obstruction of justice counts held proper. — See *Byrd v. United States*, App. D.C., 502 A.2d 451 (1985).

And no fatal variance found. — There is no fatal variance between a count which charges that the defendant took money from the "immediate actual possession" of a custodian and proof that the money he took was taken from employees, where the evidence shows that the custodian had control and custody of the money taken, the defendant took the money from an area within which the custodian reasonably could have been expected to exercise some physical control, and that the defendant did so by force directed at the custodian personally. *United States v. Spears*, 449 F.2d 946 (D.C. Cir. 1971).

Indictment not dismissed where trial delay caused by mental incapacity. — The dismissal of an indictment charging robbery for lack of a speedy trial is not required where the delay is caused by the defendant's mental incapacity to stand trial. *United States v. Lancaster*, 408 F. Supp. 225 (D.D.C. 1976).

Dismissal of indictment for insufficient language not final judgment. — The dismissal of a robbery indictment which charges only that the defendant "stole," for failure to charge specific intent to steal, is not a final judgment on the merits. *Washington v. United States*, App. D.C., 366 A.2d 457 (1976).

And no double jeopardy violation where juvenile proceeding transferred to District Court. — Where a proceeding in juvenile court has not reached the stage at which the juvenile's liberty is placed in jeopardy, and where the judge subsequently waives jurisdiction to the District Court for trial, the indictment is not subject to dismissal on the ground of double jeopardy. *United States v. Dickerson*, 271 F.2d 487 (D.C. Cir. 1959).

Presentation of 2 theories of robbery harmless where aiding and abetting clear. — Where there is clear evidence that the defendant aided and abetted a confederate who was armed, any error concerning a defect in the presentation of 2 theories of robbery and armed robbery is harmless. *United States v. Porcha*, 450 F.2d 697 (D.C. Cir. 1971).

Count charging robbery of store and guard not duplicitous. — A robbery count charging the defendant with taking money belonging to a store and the pistol of the security guard is not duplicitous. *United States v. Bolden*, 514 F.2d 1301 (D.C. Cir. 1975).

D. Defenses.

If the defendant's presence at robbery scene is shown, the issue of participation remains. *Cooper v. United States*, 357 F.2d 274 (D.C. Cir. 1966).

But denial of presence may be due to consciousness of guilt. — If the jury finds that the defendant was present at the robbery, it can consider whether a denial of presence was due to consciousness of guilt or some other reason. *Beck v. United States*, 140 F.2d 169 (D.C. Cir. 1943).

Defendant may claim that he repented and voluntarily withdrew from the robbery. *Vinci v. United States*, 159 F.2d 777 (D.C. Cir. 1947).

Or that he acted under compulsion. — In a robbery prosecution, the defendant may claim that he acted under the compulsion by another. *Vinci v. United States*, 159 F.2d 777 (D.C. Cir. 1947).

Defendant may establish a claim-of-right defense. *Smith v. United States*, App.

D.C., 330 A.2d 519 (1974); *Rhodes v. United States*, App. D.C., 354 A.2d 863 (1976).

Defendant may interpose defense of intoxication to a robbery charge. *United States v. Butler*, 499 F.2d 1006 (D.C. Cir. 1974).

And government obligated to preserve urine test. — If a urine test is made upon a defendant who interposes a defense of intoxication to a robbery charge, there is an obligation of the government to preserve the evidence. *United States v. Butler*, 499 F.2d 1006 (D.C. Cir. 1974).

In a prosecution for robbery, the defendant may claim want of criminal responsibility. *United States v. Grimes*, 421 F.2d 1119 (D.C. Cir. 1969), cert. denied, 398 U.S. 932, 90 S. Ct. 1831, 26 L. Ed. 2d 98 (1970).

Insanity defense may be raised in a prosecution for robbery. *United States v. Simms*, 463 F.2d 1273 (D.C. Cir. 1972).

But commission of robbery must be causally connected with the alleged mental illness. *United States v. Carter*, 436 F.2d 200 (D.C. Cir. 1970).

Robbery may be so proximately tied to mental impairment as to require exculpation. *United States v. Wilson*, 471 F.2d 1072 (D.C. Cir. 1972), cert. denied, 410 U.S. 957, 93 S. Ct. 1431, 35 L. Ed. 2d 691 (1973).

Bifurcated trial properly denied for insanity defense. — The refusal to grant a bifurcated trial for a defense of want of criminal responsibility is not reversible error where there is no defense on the merits and the evidence against the defendant is very strong. *United States v. Grimes*, 421 F.2d 1119 (D.C. Cir. 1969), cert. denied, 398 U.S. 932, 90 S. Ct. 1831, 26 L. Ed. 2d 98 (1970).

In a prosecution for robbery, the court does not abuse its discretion in denying a request for different juries to try the merits and an insanity defense. *Shanahan v. United States*, App. D.C., 354 A.2d 524 (1976).

Burden of proof on sanity. — Where one accused of robbery introduces evidence of a mental disease or defect, it becomes the duty of the government to prove him sane beyond a reasonable doubt. *Carey v. United States*, 296 F.2d 422 (D.C. Cir. 1961).

Issue of insanity for jury. — In a prosecution for robbery, the issue of insanity is for the jury. *Douglas v. United States*, 239 F.2d 52 (D.C. Cir. 1956); *Niport v. United States*, 263 F.2d 901 (D.C. Cir. 1959).

Whether the defendant is not guilty of robbery by reason of insanity is a jury question. *Campbell v. United States*, 307 F.2d 597 (D.C. Cir. 1962).

Evidence insufficient to support insanity defense. — A robbery is not the product of an alleged mental disease where there is evidence that the defendant is suffering from a low grade mental illness predisposing to psychosis,

particularly when under the influence of large amounts of alcohol, and the defendant was completely sober. *Hawkins v. United States*, 310 F.2d 849 (D.C. Cir. 1962).

Conviction following prior insanity commitment not invalid where defendant competent to stand trial. — A robbery conviction is not invalid on the ground that the defendant was committed following a prior acquittal by reason of insanity where there is a certification that he is competent to stand trial. *Green v. United States*, 351 F.2d 198 (D.C. Cir. 1965).

E. Evidence.

Aiding and abetting. — To convict a defendant of aiding and abetting, the government has the burden of establishing that an armed robbery had been committed, that the defendant had participated in the robbery, and that he did so with guilty knowledge. *Prophet v. United States*, App. D.C., 602 A.2d 1087 (1992).

An aider and abettor must in some way associate himself with the venture, must participate in it as though wishing to bring it about, and must seek by his action to make it succeed. *Prophet v. United States*, App. D.C., 602 A.2d 1087 (1992).

Identification allowed at scene of crime. — An identification of defendant charged with armed robbery does not violate due process where the victim gave a detailed description of the robbers, participated in the search for them and pointed them out. *United States v. Wilson*, 449 F.2d 1005 (D.C. Cir. 1971).

Taking the defendant to the scene of the crime some minutes after the robbery for identification does not give rise to undue suggestibility. *United States v. Cunningham*, 436 F.2d 907 (D.C. Cir. 1970); *United States v. Hines*, 455 F.2d 1317 (D.C. Cir. 1971), cert. denied, 406 U.S. 975, 92 S. Ct. 2427, 32 L. Ed. 2d 675 (1972); *United States v. Moore*, 459 F.2d 1360 (D.C. Cir. 1972).

A confrontation in which a robbery victim views the defendant while he is lying face down and handcuffed with his arms behind his back is permissible and is not highly suggestive where the confrontation takes place within a few minutes of the robbery and almost at the scene of the crime. *United States v. Lee*, 485 F.2d 1075 (D.C. Cir. 1973).

Presence of counsel generally required at photographic exhibition. — Generally, subject to certain exceptions, the requirement of the presence of counsel is applicable to an exhibition of photographs of a person in custody for a robbery to witnesses called to identify the person who committed the robbery. *United States v. Ash*, 461 F.2d 92 (D.C. Cir. 1972), rev'd on other grounds, 413 U.S. 300, 93 S. Ct. 2568, 37 L. Ed. 2d 619 (1973).

But identification without counsel not precluded where defendant already in custody. — The fact that the defendant is already in custody on the charge of possession of a sawed-off shotgun does not preclude the police from conducting, in the absence of counsel, a photographic identification in order to link him with armed robbery. *United States v. Jackson*, 509 F.2d 499 (D.C. Cir. 1974).

There is no presumption that photographic identification of defendant by victim is invalid. *United States v. York*, 321 F. Supp. 539 (D.D.C. 1970), *aff'd*, 440 F.2d 252 (D.C. Cir. 1971).

And resemblance between defendant's and robber's clothes not impermissibly suggestive. — The fact that the defendant's clothes in a photographic display somewhat resemble the clothes which the robbery victim said the armed robber wore does not render the photographic display impermissibly suggestive where there is a large number of pictures and men of comparable age and appearance in the array. *Herbert v. United States*, App. D.C., 340 A.2d 802 (1975).

Slide array lineup used for identification was not impermissibly suggestive where there was nothing in the slide array that would have directed the witnesses' attention to any particular individual. *McClain v. United States*, App. D.C., 460 A.2d 562 (1983).

Prior photo array identification was not suggestive and in-court identification was reliable. *Johnson v. United States*, App. D.C., 470 A.2d 756 (1983).

Remarks on composition of lineup do not give rise to likely misidentification. — Police officers' remarks to the complainant to the effect that the person whom she previously identified by photograph as a robber would be in a lineup do not render the lineup identification so suggestive as to give rise to a substantial likelihood of misidentification. *Marshall v. United States*, App. D.C., 340 A.2d 805 (1975).

And no danger where victim previously saw defendant. — Where a robbery victim has previously seen the defendant on several occasions and on the very day of the offense, there is no danger of misidentification. *Swann v. United States*, App. D.C., 326 A.2d 813 (1974).

Identification sufficient despite delay following offense. — Evidence in a prosecution for armed robbery may be sufficient to permit an identification even where there is an over-a-year time lapse between the offense and the identification. *Tolliver v. United States*, App. D.C., 378 A.2d 679 (1977).

Trial identification allowed. — There is no reversible error in allowing a robbery victim to identify the accused at his trial where the pretrial lineup was not so impermissibly suggestive as to give rise to a very substantial

likelihood of irreparable misidentification. In re *F.D.P.*, App. D.C., 352 A.2d 378 (1976).

Government must present independent basis for in-court identification. — The government has the burden of presenting clear and convincing evidence that an in-court identification by a victim of robbery is based on other than an illegally obtained pretrial identification. *United States v. York*, 321 F. Supp. 539 (D.D.C. 1970), *aff'd*, 440 F.2d 252 (D.C. Cir. 1971).

And court must determine independent source. — The court must determine if a source for an in-court identification exists independently of an invalid pretrial confrontation. *United States v. Horton*, 440 F.2d 253 (D.C. Cir. 1971).

Such as sketch of robber. — A sketch of the robber made by a witness is an independent source for a courtroom identification. *United States v. Garner*, 439 F.2d 525 (D.C. Cir. 1970), *cert. denied*, 402 U.S. 930, 91 S. Ct. 1531, 28 L. Ed. 2d 864 (1971).

And opportunity to observe during robbery. — Where the witness to a robbery is in close proximity to the robbers and has ample opportunity to observe them, she has an independent source from which she might attempt an in-court identification. *United States v. Brown*, 461 F.2d 134 (D.C. Cir. 1971).

Excellent opportunities to observe the defendant during the robbery are sufficient to provide a solid independent basis for an in-court identification, despite any later taint created by suggestive pretrial lineups. *United States v. Scriber*, 499 F.2d 1041 (D.C. Cir. 1974).

Absence of pretrial identification does not preclude in-court identification. — The fact that the eyewitnesses to a holdup fail to make any pretrial identification does not preclude an in-court identification. In re *W.K.*, App. D.C., 323 A.2d 442 (1974).

In-court identification based on observation admissible. — An in-court identification by the principal victim who had an opportunity to observe the robber at a close distance under excellent lighting conditions is admissible. *United States v. McCoy*, 475 F.2d 344 (D.C. Cir. 1973).

In a prosecution for robbery, in-court identifications by the victims based on their observation of the suspect are not improper. *United States v. Adams*, 481 F.2d 1099 (D.C. Cir. 1973).

In-court identifications made by uncounseled pretrial lineup witnesses are admissible where the identifications are based on their observations during the robbery. *United States v. Holiday*, 482 F.2d 729 (D.C. Cir. 1973).

An in-court identification by an eyewitness who observed the robber some minutes as the robber held a gun at his head is admissible. *Strickland v. United States*, App. D.C., 332 A.2d

746, cert. denied, 423 U.S. 846, 96 S. Ct. 84, 46 L. Ed. 2d 67 (1975).

Testimonial references to pretrial identification not unfairly prejudicial. — Testimonial references to a robbery victim's pretrial photographic identification of the defendant do not unfairly prejudice the defendant on the theory that it suggests a history of prior difficulty with the law. *Wilson v. United States*, App. D.C., 357 A.2d 861 (1976).

Identification sufficient for conviction. — In-trial identification is sufficient to sustain a conviction for robbery. *United States v. McNair*, 433 F.2d 1132 (D.C. Cir. 1970).

A positive identification by one eyewitness and somewhat tentative identifications by other eyewitnesses are sufficient for finding the defendant guilty of robbery. *In re W.K.*, App. D.C., 323 A.2d 442 (1974).

The victim's identification of the defendant is sufficient to sustain a conviction of armed robbery. *United States v. Jones*, 517 F.2d 176 (D.C. Cir. 1975); *Williams v. United States*, App. D.C., 355 A.2d 784 (1976).

Identification evidence held sufficient. — Evidence was sufficient for a reasonable person to find the identification evidence convincing beyond a reasonable doubt where the complaining witness had a good opportunity to observe the assailant in the daylight, where he was positive of his identification, and where he identified defendant more than once. *Goins v. United States*, App. D.C., 617 A.2d 956 (1992).

Victim's remark on prior robberies not admissible to establish identity. — A robbery victim's remark that she knew the accused "from previous robberies where he robbed us before" is not admissible for the purpose of establishing identity. *Harris v. United States*, App. D.C., 366 A.2d 461 (1976).

Identification in a prosecution for robbery may be established from fingerprint evidence. *United States v. Cary*, 470 F.2d 469 (D.C. Cir. 1972).

In a robbery prosecution, the issue of identity is submitted to the jury. *Thompson v. United States*, 188 F.2d 652 (D.C. Cir. 1951).

And evidence sufficient on issue. — Testimony of a robbery victim and that he had seen the defendant many times before the robbery, that the room was well lighted, and that he had the opportunity to observe the robber is sufficient for the jury on the issue of identity. *United States v. Inge*, 494 F.2d 1102 (D.C. Cir. 1974).

Evidence as to the defendant's identification as the perpetrator of the robbery may be sufficient to create a jury question despite asserted discrepancies in the description of the defendant given by the robbery victim and his actual physical appearance. *Anderson v. United States*, App. D.C., 364 A.2d 143 (1976).

Case submitted despite misidentification. — The submission of a robbery case to

the jury is warranted even though one eyewitness picked a person other than the defendant in a lineup. *Marshall v. United States*, App. D.C., 340 A.2d 805 (1975).

Evidence may be sufficient to support conviction notwithstanding fact that identification is "inconclusive." *United States v. Johnson*, 432 F.2d 626 (D.C. Cir.), cert. denied, 400 U.S. 949, 91 S. Ct. 257, 27 L. Ed. 2d 225 (1970); *United States v. McCall*, 460 F.2d 952 (D.C. Cir. 1972).

But where identification unconvincing, jury should acquit. — In a prosecution for robbery, where the verity of the identification is the point on which the case turns, if the circumstances of identification are not convincing, the jury should acquit. *McKenzie v. United States*, 126 F.2d 533 (D.C. Cir. 1942).

And where validity of uncorroborated identification doubtful, case remanded. — Where there is substantial doubt as to the validity of uncorroborated identification evidence on which a conviction is based, the case will be remanded to the lower court to make a fresh determination as to the action which should be taken. *United States v. Harris*, 475 F.2d 359 (D.C. Cir. 1973).

Standing of codefendants side by side constitutional. — Neither the Fifth Amendment privilege against self-incrimination nor due process standards prevent a standing of codefendants side by side before the jury to assess their relative physical appearances, in a prosecution for robbery. *Hill v. United States*, App. D.C., 367 A.2d 110 (1976).

Possession of recently stolen property may imply guilt. — The exclusive possession of property recently stolen is a basis for a permissible inference that the defendant is a robber. *Pendergrast v. United States*, 416 F.2d 776 (D.C. Cir.), cert. denied, 395 U.S. 926, 89 S. Ct. 1782, 23 L. Ed. 2d 243 (1969).

The jury might draw an inference of guilt from possession of recently stolen property. *United States v. McCall*, 460 F.2d 952 (D.C. Cir. 1972).

The jury can infer from the unexplained or unsatisfactorily explained possession of stolen goods that the defendants are guilty of taking the goods. *United States v. Joyner*, 492 F.2d 650 (D.C. Cir.), cert. denied, 419 U.S. 852, 95 S. Ct. 94, 42 L. Ed. 2d 83 (1974).

But inference goes only to identity. — The inference of guilt arising from the possession of recently stolen property is not an inference of one of the essential elements of the offense, but only of the identity of the perpetrator of a theft independently proven. *Irby v. United States*, App. D.C., 342 A.2d 33 (1975).

Circumstantial evidence. — The sequence of events surrounding an armed robbery, though shown by circumstantial evidence provided jury with ample evidence from which to

find beyond a reasonable doubt that defendant planned with another to rob victim, and profited from the robbery. *Driver v. United States*, App. D.C., 521 A.2d 254 (1987).

Circumstances surrounding arrest on unrelated charge may indicate consciousness of guilt of robbery. *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966).

Conflicting evidence in a robbery prosecution may still be sufficient for conviction. *Trimble v. United States*, 369 F.2d 950 (D.C. Cir. 1966).

Conflicting testimony of codefendants does not destroy a permissible inference of guilt from the other evidence. *United States v. Lumpkin*, 448 F.2d 1085 (D.C. Cir. 1971).

Sibling relationship not conclusive of concerted action. — The fact that the defendants are brothers, in and of itself, should not lead the jury to conclude that they acted in concert. *United States v. Hopkins*, 464 F.2d 816 (D.C. Cir. 1972).

Statement of accomplice admissible. — A statement made by an accomplice shortly after his legal arrest is admissible at trial. *Trimble v. United States*, 369 F.2d 950 (D.C. Cir. 1966).

As are statements to accomplices. — Testimony by accomplices as to statements which were made to them by the defendant during the commission of the robbery are admissible. *United States v. Leonard*, 494 F.2d 955 (D.C. Cir. 1974).

Absence of eyewitness may imply that his testimony would not have been favorable to the government. *Furqueron v. United States*, 158 F.2d 193 (D.C. Cir. 1946).

Inadequate basis for determination that witness not competent. — The fact that the robbery victim attends a school for slow learners is not an adequate basis to establish that he is not a competent witness. *In re B.D.T.*, App. D.C., 435 A.2d 378 (1981).

Proper cross-examination. — In a prosecution for robbery, an accomplice who testifies for the government may be cross-examined as to whether the government has made any disposition of an unrelated charge against him. *United States v. Leonard*, 494 F.2d 955 (D.C. Cir. 1974).

Cross-examination of an alibi witness as to her purported attempts to influence an eyewitness to the robbery is not unduly prejudicial to the defendant. *Simmons v. United States*, App. D.C., 364 A.2d 813 (1976).

Reference to modus operandi no indication of previous criminal record. — In a proceeding in which the accused is charged with robbery, a reference to modus operandi is not to be considered as an indication that the accused has any record of previous crimes. *Dyas v. United States*, App. D.C., 376 A.2d 827, cert. denied, 434 U.S. 973, 98 S. Ct. 529, 54 L. Ed. 2d 464 (1977).

Remark on previous robberies harmless where untainted testimony overpowering and jury properly instructed. — A witness's remark that she knew the accused "from previous robberies where he robbed us before" is harmless where untainted testimony overpoweringly establishes that the accused committed the offense, and the jury is instructed that the remark is not to be considered on the issue of guilt. *Harris v. United States*, App. D.C., 366 A.2d 461 (1976).

Neither is testimony elicited by defendant's counsel. — Where testimony connecting the defendant with another crime which has no connection with the robbery for which he is being tried is elicited by his own counsel on cross-examination, there is no ground for reversal. *Felton v. United States*, 170 F.2d 153 (D.C. Cir.), cert. denied, 335 U.S. 831, 69 S. Ct. 18, 93 L. Ed. 385 (1948).

As defendants cannot claim prejudice from subject they opened up. — The defendants cannot complain on appeal that they were prejudiced by evidence relating to a subject which they themselves opened up. *Adams v. United States*, App. D.C., 379 A.2d 961 (1977).

Confession sufficient to link accused to armed robbery. — In cases such as armed robbery where the fact that a crime has been committed can be shown without identifying the perpetrator, there need be no link, outside the confession, between the crime and the accused who admits having committed it. *United States v. Johnson*, 589 F.2d 716 (D.C. Cir. 1978).

Operability of weapon inferred from use. — Just as it would be reasonable for a robbery victim to assume that a weapon directed at him in a menacing manner is loaded and operable, so too would it be reasonable for the jury to infer from such facts that the weapon was operable. *Morrison v. United States*, App. D.C., 417 A.2d 409 (1980).

Weapon possession may be established by independent means. — While a weapon used in a robbery is not introduced into evidence because it is never recovered, this fact did not preclude the establishment of the defendant's possession of the weapon by independent means. *Morrison v. United States*, App. D.C., 417 A.2d 409 (1980).

Robbery not per se consequence. — Robbery of any buyer or seller in a drug or unlicensed pistol sale is not per se the "natural and probable consequence" of that transaction. *Roy v. United States*, App. D.C., 652 A.2d 1098 (1995).

Evidence competent for one form of larceny competent for other. — Housebreaking, robbery and burglary are merely aggravated forms of larceny and evidence competent in one case is competent in the others. *Edwards v. United States*, 139 F.2d 365 (D.C. Cir. 1943),

cert. denied, 321 U.S. 769, 64 S. Ct. 523, 88 L. Ed. 1064 (1944).

Evidence admissible. — The impeachment of the complaining witness in a prosecution for robbery by reference to prior convictions for crimes having elements of dishonesty is permitted. *Davis v. United States*, 409 F.2d 453 (D.C. Cir. 1969).

The court may admit expert testimony on the modus operandi of pickpockets. *United States v. Jackson*, 425 F.2d 574 (D.C. Cir. 1970).

The prosecutor is allowed to impeach the defendant, if he testifies, with earlier convictions for larceny. *United States v. Bailey*, 426 F.2d 1236 (D.C. Cir. 1970); *Davis v. United States*, 433 F.2d 1222 (D.C. Cir. 1970).

Adequate proof of joint participation warrants the admission of evidence associated with the coparticipant against the defendant. *United States v. Thurman*, 436 F.2d 280 (D.C. Cir. 1970).

A defense witness' robbery conviction is admissible in a robbery prosecution for impeachment purposes. *United States v. Baber*, 447 F.2d 1267 (D.C. Cir.), cert. denied, 404 U.S. 957, 92 S. Ct. 324, 30 L. Ed. 2d 274 (1971).

The defense counsel may use a joint written summary of grand jury testimony given by robbery victims to impeach the credibility of one of the victims as a witness. *United States v. Broadus*, 450 F.2d 1312 (D.C. Cir. 1971).

Evidence of a prior conviction by the defendant for impersonating the owner of a federal check is admissible for impeachment purposes. *United States v. Moore*, 459 F.2d 1360 (D.C. Cir. 1972).

In a prosecution for armed robbery, a sawed-off shotgun seized at the time of the arrest is admissible where there is evidence as to its resemblance to the gun used at the scene of the offense. *United States v. McKinley*, 485 F.2d 1059 (D.C. Cir. 1973).

Permitting a police officer to testify regarding the direction from which a shot causing a bullet hole in a wall was fired does not constitute an abuse of discretion in a prosecution for armed robbery. *United States v. Pierson*, 503 F.2d 173 (D.C. Cir. 1974).

Evidence of narcotics dealing is an appropriate means of establishing the theory that the defendant induced his accomplice to commit his robbery in order to obtain additional narcotics. *United States v. Lee*, 509 F.2d 400 (D.C. Cir. 1974), cert. denied, 420 U.S. 1006, 95 S. Ct. 1451, 43 L. Ed. 2d 765 (1975).

An identified shotgun is properly admitted into evidence in a prosecution for armed robbery. *United States v. Jackson*, 509 F.2d 499 (D.C. Cir. 1974).

In a prosecution of 2 defendants for armed robbery, the admission of a prior inconsistent statement of 1 defendant which implicates a 2nd defendant is not error where the statement

is introduced for purposes of impeachment. *Borrero v. United States*, App. D.C., 332 A.2d 363 (1975).

In a robbery prosecution based on an alleged episode of picking pockets, there is no error in admitting expert testimony concerning the modus operandi of pickpocket teams. *Hooks v. United States*, App. D.C., 373 A.2d 909 (1977).

Evidence of earlier robberies may be admissible to show modus operandi. In re A.L.S., App. D.C., 377 A.2d 1149 (1977).

Evidence of threats of force to influence, intimidate and impede a witness to an alleged robbery is probative as evincing consciousness of guilt. *Proctor v. United States*, App. D.C., 381 A.2d 249 (1977).

Evidence relevant to show defendant's identity. *Wheeler v. United States*, App. D.C., 470 A.2d 761 (1983).

Police officer's testimony regarding victim's on-the-scene identification of the defendant as the man who stole his wallet is admissible where the victim is available for cross-examination at the trial. *Rice v. United States*, App. D.C., 437 A.2d 582 (1981).

Admission of contemporaneous robbery constitutional. — The admission, in a prosecution for a robbery of a store, of evidence of a contemporaneous robbery of a nearby store does not violate due process where it is both legitimate and necessary to establish the sequence of events. *Williams v. United States*, App. D.C., 379 A.2d 698 (1977).

Evidence inadmissible. — In a prosecution for robbery, the admission of articles allegedly taken from the defendant is in error where the identification is insufficient. *Smith v. United States*, 157 F.2d 705 (D.C. Cir. 1946).

The crime of assault is remotely, if at all, probative on the issue of the veracity of a defendant who testifies at his own trial. *Jones v. United States*, 402 F.2d 639 (D.C. Cir. 1968).

The refusal to permit the introduction of evidence that the defendant was mistakenly arrested in another robbery case is not an abuse of discretion where there is no relationship between the 2 charges. *United States v. Hallman*, 439 F.2d 603 (D.C. Cir. 1971).

The court may reject an attempt by a witness who is unfamiliar with the defendant's reputation as to the character traits in issue in the robbery case to testify as to his character. *United States v. Hinkle*, 448 F.2d 1157 (D.C. Cir. 1971).

In a proceeding in which the accused is charged with robbery, the exclusion of a psychology professor's proffered testimony, including testimony that an eyewitness identification is not as simple as it is assumed to be, is not an abuse of discretion. *Dyas v. United States*, App. D.C., 376 A.2d 827, cert. denied, 434 U.S. 973, 98 S. Ct. 529, 54 L. Ed. 2d 464 (1977).

A police officer's opinion as to who committed

the robbery has no possible probative value. *Grier v. United States*, App. D.C., 381 A.2d 3 (1977).

Testimony of complainant sufficient to sustain conviction. — One can be convicted of robbery on the uncorroborated testimony of the complainant. *Thompson v. United States*, 188 F.2d 652 (D.C. Cir. 1951).

The complaining witness' testimony that he was robbed at gunpoint is sufficient to sustain a conviction for armed robbery. *United States v. Stevenson*, 443 F.2d 661 (D.C. Cir. 1970).

The testimony of a single witness is sufficient to sustain a robbery conviction, even though the victim does not testify. *Strickland v. United States*, App. D.C., 332 A.2d 746, cert. denied, 423 U.S. 846, 96 S. Ct. 84, 46 L. Ed. 2d 67 (1975).

The identification testimony of a robbery victim is sufficient to support a conviction. *Russell v. United States*, App. D.C., 348 A.2d 299 (1975).

Testimony by the victims of a robbery that the defendant was one of their assailants is sufficient to sustain a conviction. *United States v. Alston*, 551 F.2d 315 (D.C. Cir. 1976).

In a robbery prosecution based on an alleged episode of picking pockets, the testimony of eyewitness and of an expert witness, together with circumstantial evidence, is sufficient to support a conviction. *Hooks v. United States*, App. D.C., 373 A.2d 909 (1977).

Although one of the witnesses to the robbery is unable to identify the defendant as the perpetrator, where other witnesses make a positive identification, that is sufficient evidence to support a finding of guilt beyond a reasonable doubt. *Grier v. United States*, App. D.C., 381 A.2d 3 (1977).

Evidence insufficient to sustain conviction. — The defendant's presence at the scene of the crime, his slight association with the actual perpetrator, and a subsequent flight, does not sustain a conviction for robbery. *Bailey v. United States*, 416 F.2d 1110 (D.C. Cir. 1969).

Evidence that the victim was confronted by 2 men who held a gun on him and went through his pockets and that he told a policeman that he had been robbed is insufficient to support an armed robbery conviction. *United States v. McGill*, 487 F.2d 1208 (D.C. Cir. 1973).

Evidence sufficient to warrant jury inference that defendant had removed money from safe. *Colbert v. United States*, App. D.C., 471 A.2d 258 (1984).

Evidence sufficient to convict defendant of aiding and abetting armed robbery. *Taylor v. United States*, App. D.C., 601 A.2d 1060 (1991), modified on other grounds, App. D.C., 661 A.2d 636 (1995); *Prophet v. United States*, App. D.C., 602 A.2d 1087 (1992).

Evidence sufficient to sustain conviction. — See *Jackson v. United States*, 359 F.2d

260 (D.C. Cir.), cert. denied, 385 U.S. 877, 87 S. Ct. 157, 17 L. Ed. 2d 104 (1966); *United States v. Cunningham*, 436 F.2d 907 (D.C. Cir. 1970); *United States v. Wolford*, 444 F.2d 876 (D.C. Cir. 1971); *United States v. Carter*, 445 F.2d 669 (D.C. Cir. 1971), cert. denied, 405 U.S. 932, 92 S. Ct. 988, 30 L. Ed. 2d 806 (1972); *Creek v. United States*, App. D.C., 324 A.2d 688 (1974); *Hawkins v. United States*, App. D.C., 329 A.2d 781 (1974); *United States v. Belt*, 514 F.2d 837 (D.C. Cir. 1975); *Borrero v. United States*, App. D.C., 332 A.2d 363 (1975); *In re A.B.H.*, App. D.C., 343 A.2d 573 (1975); *McMillan v. United States*, App. D.C., 373 A.2d 912 (1977); *United States v. Johnson*, 589 F.2d 716 (D.C. Cir. 1978); *Franey v. United States*, App. D.C., 382 A.2d 1019 (1978); *Samuels v. United States*, App. D.C., 385 A.2d 16 (1978); *Byrd v. United States*, App. D.C., 388 A.2d 1225 (1978); *In re L.W.*, App. D.C., 390 A.2d 435 (1978); *Christian v. United States*, App. D.C., 394 A.2d 1 (1978), cert. denied, 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315 (1979); *Glass v. United States*, App. D.C., 395 A.2d 796 (1978); *Jackson v. United States*, App. D.C., 395 A.2d 99 (1978); *Ellis v. United States*, App. D.C., 395 A.2d 404 (1978), cert. denied, 442 U.S. 913, 99 S. Ct. 2830, 61 L. Ed. 2d 280 (1979); *Cunningham v. United States*, App. D.C., 408 A.2d 1240 (1979); *Johnson v. United States*, App. D.C., 420 A.2d 1214 (1980); *Hilton v. United States*, App. D.C., 435 A.2d 383 (1981); *Perkins v. United States*, App. D.C., 473 A.2d 841 (1984); *Fields v. United States*, App. D.C., 484 A.2d 570 (1984), cert. denied, 471 U.S. 1067, 105 S. Ct. 2144, 85 L. Ed. 2d 501 (1985); *Hordge v. United States*, App. D.C., 545 A.2d 1249 (1988); *Jones v. United States*, App. D.C., 566 A.2d 44 (1989).

Evidence sufficient to support robbery conviction where victim, who knew defendant, testified that defendant took money from his wallet while codefendant held him at gunpoint. *Streater v. United States*, App. D.C., 478 A.2d 1055 (1984).

Although, due to complainant's inability to identify her assailant at trial, the evidence against defendant on the charges was circumstantial, the cumulative weight of this evidence was more than sufficient to sustain the jury's finding that appellant was guilty of the offenses of rape, robbery and kidnapping beyond a reasonable doubt. *White v. United States*, App. D.C., 484 A.2d 553 (1984).

Where the government had shown that defendant was at the robbery scene, but had not presented evidence that he participated in the robbery, defendant's conviction was reversed. *Acker v. United States*, App. D.C., 618 A.2d 688 (1992).

F. Instructions.

Argument of counsel is not evidence. *Fernandez v. United States*, App. D.C., 375 A.2d 484 (1977).

Prosecution should not arouse undue passion or sympathy. — The prosecution should never attempt to put the jury in the place of the victim of the robbery or to arouse its undue passion or sympathy. *Hill v. United States*, App. D.C., 367 A.2d 110 (1976).

Prosecutor's remarks proper. — In a robbery prosecution, the prosecutor's statement that self-defense was an inference that could be drawn from the evidence but that he thought that the testimony was that the defendant struck the victim is not reversible error. *Johnson v. United States*, 275 F.2d 898 (D.C. Cir. 1960), cert. denied, 365 U.S. 860, 81 S. Ct. 827, 5 L. Ed. 2d 823 (1961).

A reference by a prosecutor in a closing argument of a robbery case to "reputable officers" and a "very sweet" complaining witness does not exceed the proper bounds of advocacy. *Jackson v. United States*, 359 F.2d 260 (D.C. Cir.), cert. denied, 385 U.S. 877, 87 S. Ct. 157, 17 L. Ed. 2d 104 (1966).

A prosecutor's statement allegedly suggesting that the defendant charged with robbery was looking for a new victim on the night of his arrest is not, by itself, so prejudicial as to require a reversal. *Davis v. United States*, App. D.C., 367 A.2d 1254 (1976), cert. denied, 434 U.S. 847, 98 S. Ct. 154, 54 L. Ed. 2d 114 (1977).

Extreme prosecutorial language may vitiate judgment. — In a robbery prosecution, the language of the prosecuting attorney may be so extreme as to vitiate the judgment and permit a collateral attack. *Adams v. United States*, 222 F.2d 45 (D.C. Cir. 1955).

But improper remarks may be offset by instruction. — Where portions of the prosecution's closing argument are objectionable, but are sufficiently offset by a warning to the jury, there is no ground for reversal. *Trimble v. United States*, 369 F.2d 950 (D.C. Cir. 1966).

In a prosecution for robbery, allegedly improper prosecutorial remarks do not affect the substantial rights of the defendant where such remarks are not referenced to the defendant's failure to testify in his own defense and where the court gives an adequate curative instruction. *Jones v. United States*, App. D.C., 343 A.2d 346 (1975).

Jury must be given a clear statement of each element of robbery which the government must prove. *Jackson v. United States*, 348 F.2d 772 (D.C. Cir. 1965).

Instruction on specific intent should not be omitted in a prosecution for armed robbery. *United States v. Gaither*, 440 F.2d 262 (D.C. Cir. 1971).

Refusal to include robbery element in count not prejudicial where instructions given. — The refusal to amend the robbery count at the beginning of the trial to include an allegation of specific intent to steal is not prejudicial where clear, detailed and thorough in-

structions are given. *United States v. Robinson*, 475 F.2d 376 (D.C. Cir. 1973).

Instruction under § 22-105 not necessary. — An instruction under § 22-105 relating to aiding and abetting is not necessary in order for the acts of one principal in furtherance of a robbery to be imputed to another principal. *Hazel v. United States*, App. D.C., 353 A.2d 280 (1976).

Instruction on lesser included offense not required. — In a robbery prosecution of a pickpocket, the court is not required to instruct on the lesser included offense of larceny. *Davis v. United States*, 433 F.2d 1222 (D.C. Cir. 1970).

An instruction on a lesser included offense of petit larceny was not warranted where there was sufficient evidence establishing the robbery element of "putting in fear" to eliminate any fair possibility that the crime, if committed, could be less than robbery. *Dublin v. United States*, App. D.C., 388 A.2d 461 (1978).

Where the defendant's evidence in a prosecution for felony murder and armed robbery was so incredible that it provided no rational basis for a lesser charge of assault with a deadly weapon or simple assault, the trial court was not required to instruct the jury on those lesser included offenses. *Day v. United States*, App. D.C., 390 A.2d 957 (1978), rev'd on other grounds sub nom. *Graves v. United States*, App. D.C., 490 A.2d 1086 (1984).

In an action for felony murder, kidnapping and robbery, the trial court did not err in declining to grant a jury instruction on the lesser included offense of robbery where there was no sufficient evidentiary basis for the lesser included charge. *Catlett v. United States*, App. D.C., 545 A.2d 1202 (1988), cert. denied, 488 U.S. 1017, 109 S. Ct. 814, 102 L. Ed. 2d 803 (1989).

A special unanimity instruction was not necessary to ensure unanimity by the jury on whether defendant was guilty of armed robbery of a van or of the tools and money inside the van. These were not legally or factually separate incidents. *Simms v. United States*, App. D.C., 634 A.2d 442 (1993).

Where a jury could only have found defendant guilty of robbery, the trial court did not err in refusing to give the jury an instruction on the lesser included offense of larceny. *Ulmer v. United States*, App. D.C., 649 A.2d 295 (1994).

Instruction on lesser included offense required. — Where there was an evidentiary basis for an instruction on the lesser included offense of taking property without right, the court erred in denying defense counsel's request for such an instruction, and defendant's robbery conviction was therefore reversed. *Simmons v. United States*, App. D.C., 554 A.2d 1167 (1989).

Court may fail to give special instruction on identification. — The failure of the

court, in the absence of a request, to give a special instruction on identification in a robbery prosecution in which the case turns on the testimony of a single witness is not prejudicial where the witness had an adequate opportunity to observe and made a spontaneous identification and where the instructions given with respect to burden of proof, alibi and the problem of mistaken identity significantly focus attention on the issue of identity. *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972).

The court may deny a requested instruction of a defendant charged with robbery that, in the experience of many, it is more difficult to identify members of a different race than members of one's own and that if such was the jury's experience it could consider that in evaluating the witness' testimony. *Abney v. United States*, App. D.C., 347 A.2d 402 (1975).

As well as one concerning credibility. — A court which gives a general instruction on credibility does not abuse its discretion in denying a request of a defendant charged with robbing priests that a special instruction be given concerning the credibility of clerics. *Coleman v. United States*, App. D.C., 379 A.2d 951 (1977).

Incomplete instruction on flight not plain error. — In a prosecution for robbery, an incomplete instruction on flight does not constitute plain error affecting the substantial rights of the defendant. *Woody v. United States*, App. D.C., 369 A.2d 592 (1977).

Court may supplement aiding and abetting instruction. — Where the jury has commenced its deliberations in a prosecution for robbery, the court does not abuse its discretion by giving a supplemental instruction on aiding and abetting. *Atkinson v. United States*, App. D.C., 322 A.2d 587 (1974).

Instruction improper. — An instruction which erroneously includes a statement that the defense did not deny that the robbery took place is plain error warranting a reversal. *United States v. Todd*, 463 F.2d 302 (D.C. Cir. 1972).

Where the indictment charges both armed robbery and robbery, but it is undisputed that the robber was armed, the judge errs in instructing on the lesser included offense of robbery. *Lightfoot v. United States*, App. D.C., 378 A.2d 670 (1977).

Trial court did not plainly err in its treatment of unanimous verdict requirement when it instructed the jury that it could convict of armed robbery if it found that defendant was armed or had readily available a pistol and/or a knife. *Gordon v. United States*, App. D.C., 466 A.2d 1226 (1983).

G. Verdict.

Sending deadlocked jury back for deliberation after "Winters instruction" not co-

ercive. — After giving a "Winters instruction" to an apparently deadlocked jury in a prosecution for robbery, sending it back for deliberation still another time for a short period, following a subsequent report that it is still "hung," does not in effect coerce a verdict. *Thompson v. United States*, App. D.C., 354 A.2d 848 (1976).

"Allen charge" not reversible error. — The submission of an "Allen charge," with certain statements added thereto, in a prosecution for robbery, is not reversible error. *United States v. Wilson*, 449 F.2d 1005 (D.C. Cir. 1971).

Continuing to poll jury after juror disagrees with verdict reversible error. — The court commits reversible error by continuing to poll the jury after a juror indicates she does not agree with the guilty verdict on the 1st robbery count. *Kendall v. United States*, App. D.C., 349 A.2d 464 (1975).

And it is improper for jury foreman to reveal the status of votes. *Mullin v. United States*, 356 F.2d 368 (D.C. Cir. 1966).

Refusal to allow foreman to approach bench not plain error. — Where the foreman requests to approach the bench when asked whether the jury has reached a verdict with respect to a robbery charge, but is denied his request, and it is then announced that the jury has reached a guilty verdict, there is no plain error. *Johnson v. United States*, App. D.C., 360 A.2d 502 (1976).

Trial court's acceptance of a guilty verdict was not plain error where juror's response, "Guilty, I guess," to defense counsel's poll of the jury, did not demonstrate such uncertainty about defendant's guilt as to constitute an infringement of defendant's Sixth Amendment right to a unanimous verdict. *Johnson v. United States*, App. D.C., 470 A.2d 756 (1983).

Acquittal of armed robbery not acquittal of unarmed robbery. — Where the jury returns a verdict of not guilty of armed robbery but is unable to agree on unarmed robbery, the acquittal of armed robbery is not an acquittal of unarmed robbery. *United States v. Scott*, 464 F.2d 832 (D.C. Cir. 1972).

Where evidence does not support finding, only larceny verdict allowed. — If the evidence in a robbery prosecution does not warrant a finding that the property involved was taken from victim's person or immediate actual possession, then the jury can only find the defendant guilty of the lesser included offense of larceny. *United States v. Dixon*, 469 F.2d 940 (D.C. Cir. 1972).

Defendant cannot be convicted of both the attempt and the completed robbery. *United States v. Spears*, 449 F.2d 946 (D.C. Cir. 1971).

Defendant cannot be convicted on multiple counts for unitary transaction. — Where a robbery constitutes a unitary transac-

tion, the defendant cannot be convicted and sentenced on more than a single robbery count. *United States v. Hopkins*, 464 F.2d 816 (D.C. Cir. 1972).

Where there is a single continuous transaction, the defendant cannot be convicted and sentenced on multiple counts of assault with a dangerous weapon. *United States v. Hopkins*, 464 F.2d 816 (D.C. Cir. 1972).

If anything, the federal mail robbery statute contemplates a single conviction, not multiple convictions, where the 1st tier of the robbery is aggravated by the use of a deadly weapon. *United States v. Knight*, 509 F.2d 354 (D.C. Cir. 1974).

One of defendant's convictions of armed burglary was vacated where both were predicated on a single transaction. *Thacker v. United States*, App. D.C., 599 A.2d 52 (1991).

Assault with dangerous weapon and armed robbery convictions cannot stand together. — A conviction for assault with a dangerous weapon cannot stand in view of defendant's conviction for armed robbery arising out of the same incident. *Harling v. United States*, App. D.C., 460 A.2d 571 (1983).

But separate transactions allows multiple convictions. — Where an incident involves separate transactions there can be multiple convictions of robbery. *Jones v. United States*, App. D.C., 362 A.2d 718 (1976).

Defendant may be convicted of both housebreaking and robbery where offenses are independent. *Irby v. United States*, 250 F. Supp. 983 (D.D.C. 1965), *aff'd*, 390 F.2d 432 (D.C. Cir. 1967).

Housebreaking and robbery convictions can stand together. *Dixon v. United States*, App. D.C., 320 A.2d 318 (1974).

Inconsistent convictions for robbery and murder stand where both are consistent with evidence. *Jackson v. United States*, 313 F.2d 572 (D.C. Cir. 1962).

Underlying felony merges into felony murder conviction so that convictions for the felonies of rape, robbery, and burglary, which underlay a felony murder conviction, should be vacated. *Leasure v. United States*, App. D.C., 458 A.2d 726 (1983).

Separate assault conviction allowed where weapon pointed at distinct individuals at different times. — Where, in the course of an armed robbery, a shotgun was pointed at distinct individuals at different times, there is no error in entering separate judgments of conviction of armed robbery and assault with a dangerous weapon. *Borrero v. United States*, App. D.C., 332 A.2d 363 (1975).

Or where assault occurred after robbery. — A conviction of assault with a deadly weapon will not be set aside as a lesser included offense of armed robbery where the assault occurred after the conclusion of robbery. *Davis*

v. United States, App. D.C., 367 A.2d 1254 (1976), *cert. denied*, 434 U.S. 847, 98 S. Ct. 154, 54 L. Ed. 2d 114 (1977).

And possession of prohibited weapon conviction does not merge into armed robbery conviction. *Woody v. United States*, App. D.C., 369 A.2d 592 (1977).

But improper to convict for assault necessarily included in robbery. — It is improper to convict the defendant both for assault with a dangerous weapon and armed robbery where the assault is a necessary part of the evidence needed to support the count of armed robbery. *Taylor v. United States*, App. D.C., 324 A.2d 683 (1974).

And where assault against same person, offenses merge. — Where armed robberies and assaults with a dangerous weapon are committed against the same persons, the latter offenses merge into the former. *United States v. Holiday*, 482 F.2d 729 (D.C. Cir. 1973).

Merger of robbery and kidnapping. — While not every robbery gives rise to responsibility for kidnapping, kidnapping does not necessarily merge into robbery when committed during closely related incidents. When the detention or confinement is an integral part of the robbery, the two will merge, and only a robbery conviction will stand. However, where a jury could reasonably conclude that the detention or confinement was not "approximately coextensive" in time and place with the crime itself, then each may constitute a separate criminal act. *Catlett v. United States*, App. D.C., 545 A.2d 1202 (1988), *cert. denied*, 488 U.S. 1017, 109 S. Ct. 814, 102 L. Ed. 2d 803 (1989).

Actions of defendants in robbery and kidnapping case in forcing the victim into the alley, away from the street where bystanders may have seen and interfered, both exposed the victim to more danger and decreased the risk that appellants would be caught. This forcible detention, which began before and continued after the victim's valuables were forcibly removed, cannot be deemed a detention approximately coextensive or a necessary incident to the crime of robbery. Thus, the evidence was sufficient to convict appellants of both crimes. *Catlett v. United States*, App. D.C., 545 A.2d 1202 (1988), *cert. denied*, 488 U.S. 1017, 109 S. Ct. 814, 102 L. Ed. 2d 803 (1989).

Appellant's merger claims failed, where the armed robbery and kidnapping offenses each required proof of an element that the other did not. *Monroe v. United States*, App. D.C., 600 A.2d 98 (1991).

Defendant cannot be convicted under both federal and local provisions. — The part of the federal mail robbery statute prohibiting assault is intended to prohibit certain kinds of attempts to rob and cannot support an independent conviction where a defendant is convicted of the same crime he is charged with

attempting. *United States v. Spears*, 449 F.2d 946 (D.C. Cir. 1971).

The conviction of both a violation of this section and a violation of the federal mail robbery statute arising from a single transaction is improper. *United States v. Knight*, 509 F.2d 354 (D.C. Cir. 1974).

Dual sentencing for armed bank robbery under the United States Code and armed robbery under the District of Columbia Code is impermissible, and it is the duty of the trial court to select the counts on which to impose sentence when the jury returns verdicts of guilty under both statutes. *United States v. Johnson*, 589 F.2d 716 (D.C. Cir. 1978).

H. Sentence.

Sentence not precluded by merger of offenses. — The fact that defendant's felony murder and underlying robbery convictions merged did not prevent the court from sentencing defendant on the robbery conviction, where the felony murder conviction had been vacated on the ground of double jeopardy. *Garris v. United States*, App. D.C., 491 A.2d 511 (1985).

Consecutive sentences proper for robbery and assault convictions. — It is proper to increase punishment where there have been convictions for robbery and for assault with a dangerous weapon by imposing consecutive sentences. *United States v. Suggs*, 269 F. Supp. 732 (D.D.C. 1967).

Consecutive terms of imprisonment for robbery and assault is not an error where the assaults are separate offenses. *Sutton v. United States*, 434 F.2d 462 (D.C. Cir. 1970), cert. denied, 402 U.S. 988, 91 S. Ct. 1676, 29 L. Ed. 2d 153 (1971).

Concurrent sentences for armed robbery and felony murder held illegal. — Since a conviction for killing in the course of an armed robbery cannot be had without proving all the elements of the offense of armed robbery, imposition of concurrent sentences of 20 years to life on each separate count of felony murder and armed robbery is illegal as effectively resulting in multiple or cumulative punishment and must be vacated. *Tribble v. United States*, App. D.C., 447 A.2d 766 (1982).

Sentencing defendant for 2 felony murders based upon the offenses of sodomy and armed robbery involving a single homicide was error. *Adams v. United States*, App. D.C., 502 A.2d 1011 (1986).

Sentence not illegal because no credit given for prior custody. — A sentence for robbery is not illegal merely because the court gives no credit for the time spent in custody before the sentence. *Williams v. United States*, 335 F.2d 290 (D.C. Cir. 1964).

Assertion of innocence cannot be considered in determining the sentence to be

imposed. *Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1969).

Defendant convicted of robbery may explicitly request to be sentenced without an investigation. *United States v. Spadoni*, 435 F.2d 448 (D.C. Cir. 1970).

Where bank robbery consummated, concurrent sentence for entering prohibited. — Where a bank robbery has been consummated, the defendant cannot be given a concurrent sentence for entering the bank with intent to commit robbery. *United States v. Hopkins*, 464 F.2d 816 (D.C. Cir. 1972).

Sentence not equivalent to detainer. — The existence of a District of Columbia armed robbery sentence is not remotely equivalent to a detainer lodged by another sovereign under the Interstate Agreement on Detainers. *Goode v. Markley*, 603 F.2d 973 (D.C. Cir. 1979), cert. denied, 444 U.S. 1083, 100 S. Ct. 1039, 62 L. Ed. 2d 768 (1980).

Uncharged offense taken into account in sentencing. — Trial judge acted permissibly in sentencing defendant, who had pled guilty to 1 count of assault with intent to rob while armed and 2 counts of armed robbery, based on the totality of the evidence surrounding his character and potential for rehabilitation, and did not deny defendant due process in taking into account the existence of an uncharged offense that the government, based essentially on *modus operandi*, asserted was attributable to defendant but which, the court knew, defendant adamantly denied. *Powers v. United States*, App. D.C., 588 A.2d 1166 (1991).

I. Appeal.

Defendant may vacate sentence on ground of coerced plea. — The defendant may move to vacate a robbery sentence on the ground that the underlying plea was coerced. *Smith v. United States*, 265 F.2d 99 (D.C. Cir.), cert. denied, 361 U.S. 843, 80 S. Ct. 95, 4 L. Ed. 2d 81 (1959).

No remand for resentencing necessary on vacation of concurrent conviction. — Where a sentence imposed on a conviction for assault with a dangerous weapon runs concurrently with a robbery conviction, no remand for resentencing is necessary on a vacation of the conviction for assault with a dangerous weapon. *United States v. Kearney*, 498 F.2d 61 (D.C. Cir. 1974).

Appellant presenting substantial wrongful identification claim may be released. — An appellant who is convicted of robbery, but whose appeal presents a substantial claim that he was wrongfully identified, may be ordered released on personal recognizance. *Banks v. United States*, 414 F.2d 1150 (D.C. Cir. 1969).

Test for reversal is whether there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt. *McClain v. United States*, App. D.C., 460 A.2d 562 (1983).

There is no constitutional right to an oral argument on appeal from a robbery conviction. *United States v. Baber*, 447 F.2d 1267 (D.C. Cir.), cert. denied, 404 U.S. 957, 92 S. Ct. 324, 30 L. Ed. 2d 274 (1971).

Impeachment issue not noticeable for 1st time on appeal. — The issue as to whether the court erred in permitting the prosecutor to impeach certain witnesses will not be noticed for the 1st time on appeal from a conviction for assault with intent to commit robbery. *Green v. United States*, 397 F.2d 643 (D.C. Cir. 1968).

And case resting upon allegedly inadmissible evidence not reversible for plain error. — A robbery case resting upon the admission of evidence claimed to be inadmissible is not one permitting a reversal for plain error not brought to the attention of the trial court. *Baxter v. United States*, 337 F.2d 547 (D.C. Cir. 1964).

New trial based on new evidence on witness' credibility may be denied. — The denial of a motion for a new trial made after a conviction for robbery based on newly discovered evidence bearing only upon the credibility of a witness for the prosecution is not an abuse of discretion. *Thompson v. United States*, 188 F.2d 652 (D.C. Cir. 1951); *Wilkins v. United States*, 228 F.2d 37 (D.C. Cir. 1955).

And not warranted where no satisfactory evidence that key recanting witness' testimony false. — A new trial is not warranted under the "Larrison" standard where the defendants can offer no credible or admissible evidence from which the court can be "reasonably satisfied" that a key recanting witness' trial testimony was false. *United States v. Mackin*, 561 F.2d 958 (D.C. Cir.), cert. denied, 434 U.S. 959, 98 S. Ct. 490, 54 L. Ed. 2d 319 (1977).

Nor where transcript of guilty plea by other person known and unsecured. — The court does not abuse its discretion in denying a new trial on the ground of newly discovered evidence consisting of the transcript of the testimony of a person who pleaded guilty to the robbery charged where the existence of the transcript was known at the time of trial and there was no due diligence in attempting to secure it. *Vaughn v. United States*, App. D.C., 364 A.2d 1187 (1976).

Unnecessary sua sponte declaration of mistrial in juvenile hearing bars retrial. — Where a sua sponte declaration of a mistrial in a fact-finding hearing on a petition charging a juvenile with robbery is not dictated by manifest necessity, a retrial is barred by the constitutional prohibition on double jeopardy. *District of Columbia v. I.P.*, App. D.C., 335 A.2d 224 (1975).

But where jury makes no findings upon mistrial, subsequent conviction not precluded. — The fact that a mistrial is declared in the 1st prosecution for robbery will not, under the doctrine of collateral estoppel, preclude a conviction of robbery in a second prosecution, where the jury in the 1st trial makes no findings. *United States v. Perry*, 504 F.2d 180 (D.C. Cir. 1974).

And where acquittal not raised at second trial, double jeopardy defense waived. — Where the defendant does not raise at his second trial his acquittal of robbery at his first trial, he waives the defense of double jeopardy. *United States v. Scott*, 464 F.2d 832 (D.C. Cir. 1972).

And barred where separate trials for murder and robbery result from accused's efforts. — Where separate trials on charges of murder and robbery are the result of the accused's own efforts he cannot raise double jeopardy, *res judicata*, or collateral estoppel to bar a murder trial following the robbery trial. *In re A.L.S.*, App. D.C., 377 A.2d 1149 (1977).

§ 22-2902. Attempt to commit robbery.

Whoever attempts to commit robbery, as defined in § 22-2901, by an overt act, shall be imprisoned for not more than 3 years or be fined not more than \$500, or both. (Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 811; 1973 Ed., § 22-2902.)

Cross references. — As to additional penalty for committing crime when armed, see §§ 22-3201 and 22-3202.

Elements. — One is guilty of attempted robbery if he commits an act which went beyond mere preparation and was reasonably adapted to the commission of robbery and he acts with specific intent to commit robbery.

Hawkins v. United States, App. D.C., 399 A.2d 1306 (1979).

In attempted robbery there must be proof of an intent to rob. *Hawkins v. United States*, App. D.C., 399 A.2d 1306 (1979).

Action beyond mere preparation necessary. — Where defendants had made careful plans, had conducted a dry run of the planned

robbery the day before and at the time of their arrest were disguised, heavily armed and proceeding toward the target bank which was less than 4 blocks away, they had gone beyond mere preparation and were within dangerous proximity of the criminal end sought to be attained, so as to be guilty of attempted robbery. *Jones v. United States*, App. D.C., 386 A.2d 308 (1978), cert. denied, 444 U.S. 925, 100 S. Ct. 263, 62 L. Ed. 2d 181 (1979).

When attempted picking pockets is the factual predicate for a charge of attempted robbery, proof of the commission of any of the acts enumerated in § 22-1121(4) amounts to proof of an act which went beyond mere preparation, which is an element of proof necessary for a conviction for attempted robbery. *Hawkins v. United States*, App. D.C., 399 A.2d 1306 (1979).

Intent. — Intent being a state of mind, unless admitted by the defendant, it must be shown by circumstantial evidence because there is no way of fathoming and scrutinizing the human mind. *Jones v. United States*, App. D.C., 516 A.2d 929 (1986), cert. denied, 481 U.S. 1054, 107 S. Ct. 2193, 95 L. Ed. 2d 848 (1987).

But not assault. — Under this section and § 22-2901, an attempted robbery or actual robbery is possible without an assault. *Pope v. Huff*, 141 F.2d 727 (D.C. Cir. 1944).

Scope of § 22-2901. — Under section 22-2901, robbery includes a taking by force or violence, whether against resistance or by a sudden or stealthy seizure or snatching, or by putting in fear. *Turner v. United States*, 16 F.2d 535 (D.C. Cir. 1926).

Relationship between disorderly conduct and attempted robbery. — There is an inherent relationship between the offenses of attempted robbery based on picking pockets and disorderly conduct, as the "act" elements of both attempted robbery predicated on picking pockets and disorderly conduct are identical. *Hawkins v. United States*, App. D.C., 399 A.2d 1306 (1979).

Report of robbery and flight from police constitutes probable cause for arrest. — A police officer who receives a report that the defendant appears to have robbed a person and who approaches the defendant, who then begins running away, has probable cause for a warrantless arrest. *Clarke v. United States*, App. D.C., 256 A.2d 782 (1969).

On-the-scene confrontation must not create likelihood of misidentification. — An on-the-scene confrontation must not be so unduly suggestive as to create a substantial likelihood of misidentification. *Bowler v. United States*, App. D.C., 322 A.2d 281 (1974).

Trial identification not error where pre-trial lineup not impermissibly suggestive. — There is no reversible error in allowing a robbery victim to identify the defendant at his trial where the pretrial lineup was not so im-

permissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. *In re F.D.P.*, App. D.C., 352 A.2d 378 (1976).

Robbery is an infamous crime, and it must be prosecuted by an indictment. *United States v. Evans*, 28 App. D.C. 264 (1906).

Joinder of offenses prejudicial where similarities not close and jury confused. — There is prejudice in the joinder of robbery and attempted robbery where the similarities are not so close that proof of one crime would establish proof of the other if there were separate trials, and where the jury is confused and is unable to treat the evidence relevant to each charge separately and distinctly. *Drew v. United States*, 331 F.2d 85 (D.C. Cir. 1964).

But where offenses similar and defendant fails to convince otherwise, severance refused. — Where a petition charges armed robbery of one person and attempted armed robbery and felony murder of another, and where the offenses were committed at approximately the same place, within minutes of each other, and were similar and involved a great deal of overlapping evidence, and where the defendant makes no convincing showing that he has important testimony concerning one count and a strong need to refrain from testifying on the other, the court does not abuse its discretion in refusing to sever the offenses. *In re F.D.P.*, App. D.C., 352 A.2d 378 (1976).

Defendant can be convicted of both attempted robbery while armed and assault with a dangerous weapon arising out of the same incident where the offenses were directed against different victims. *Adams v. United States*, App. D.C., 466 A.2d 439 (1983).

Attempted armed robbery is lesser included offense of felony murder. *Price v. United States*, App. D.C., 531 A.2d 984 (1987).

Defendant can be sentenced for both felony murder during burglary while armed and felony murder during attempted armed robbery arising out of the same shooting of a single victim since the defendant violated 2 statutory provisions requiring proof of different elements. *Adams v. United States*, App. D.C., 466 A.2d 439 (1983).

Evidence sufficient to sustain conviction. — Evidence sustains a conviction of attempt to commit robbery notwithstanding the fact that the testimony of the principal prosecution witness is uncorroborated and that the intent to rob can only be inferred. *Accardo v. United States*, 249 F.2d 519 (D.C. Cir. 1957), cert. denied, 356 U.S. 943, 78 S. Ct. 787, 2 L. Ed. 2d 817 (1958).

The testimony of a girl friend of a defendant as to incriminating statements which both defendants made to her sustains a conviction for attempted robbery. *Calloway v. United States*,

399 F.2d 1006 (D.C. Cir.), cert. denied, 393 U.S. 987, 89 S. Ct. 464, 21 L. Ed. 2d 448 (1968).

Evidence sufficient. — See *Jones v. United States*, App. D.C., 386 A.2d 308 (1978), cert. denied, 444 U.S. 925, 100 S. Ct. 263, 62 L. Ed. 2d 181 (1979); *Christian v. United States*, App. D.C., 394 A.2d 1 (1978), cert. denied, 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315 (1979); *Downing v. United States*, App. D.C., 434 A.2d 409 (1981).

Defendant entitled to credit for time in custody prior to resentencing. — After a successful appeal of a conviction for robbery and for assault with intent to commit robbery, the defendant, upon his resentencing for attempted robbery, is entitled to credit for the time he was in custody prior to the imposition of the sentence for robbery. *Short v. United States*, 344 F.2d 550 (D.C. Cir. 1965).

Cited in *Campbell v. United States*, 258 F.2d 160 (D.C. Cir. 1958); *United States v. Person*, 478 F.2d 659 (D.C. Cir. 1973); *Brabham v. United States*, App. D.C., 326 A.2d 254 (1974), cert. denied, 421 U.S. 989, 95 S. Ct. 1993, 44 L. Ed. 2d 479 (1975); *Taylor v. United States*, App. D.C., 372 A.2d 1009 (1977); *Sinclair v. United States*, App. D.C., 388 A.2d 1201 (1978), cert. denied, 439 U.S. 1118, 99 S. Ct. 1026, 59 L. Ed. 2d 77 (1979); *Peoples v. United States*, App. D.C., 395 A.2d 41 (1978), cert. denied, 442 U.S. 911, 99 S. Ct. 2826, 61 L. Ed. 2d 277 (1979); *Reavis v. United States*, App. D.C., 395 A.2d 75 (1978); *Parker v. United States*, App. D.C., 406 A.2d 1275 (1979); *United States v. McKoy*, 645 F.2d 1037 (D.C. Cir. 1981); *Dobson v. United States*, App. D.C., 426 A.2d 361 (1981); *Towles v. United States*, App. D.C., 428 A.2d 836 (1981); *Lucas v. United States*, App. D.C., 436 A.2d 1282 (1981); *In re C.P.*, App. D.C., 439 A.2d 460 (1981); *Jones v. United States*, App. D.C., 441 A.2d 1004 (1982); *Greater Wash. Bus. Ctr. v. District of Columbia Comm'n on Human*

Rights, App. D.C., 454 A.2d 1333 (1982); *McClinnahan v. United States*, App. D.C., 454 A.2d 1340 (1982), cert. denied, 464 U.S. 867, 104 S. Ct. 205, 78 L. Ed. 2d 179 (1983); *McCowan v. United States*, App. D.C., 458 A.2d 1191 (1983); *McNeil v. United States*, App. D.C., 465 A.2d 807 (1983); *Smith v. United States*, App. D.C., 470 A.2d 315 (1983), cert. denied, 469 U.S. 1218, 105 S. Ct. 1201, 84 L. Ed. 2d 344 (1985); *Sherer v. United States*, App. D.C., 470 A.2d 732 (1983), cert. denied, 469 U.S. 931, 105 S. Ct. 325, 83 L. Ed. 2d 262 (1984); *Wood v. United States*, App. D.C., 472 A.2d 408 (1984); *Perkins v. United States*, App. D.C., 473 A.2d 841 (1984); *Pryor v. United States*, App. D.C., 503 A.2d 678 (1986); *Towles v. United States*, App. D.C., 521 A.2d 651, cert. denied, 483 U.S. 1008, 107 S. Ct. 3236, 97 L. Ed. 2d 741 (1987); *Lucas v. United States*, App. D.C., 522 A.2d 876 (1987); *Price v. United States*, App. D.C., 531 A.2d 984 (1987); *Waller v. United States*, App. D.C., 531 A.2d 994 (1987); *Ellerbe v. United States*, App. D.C., 545 A.2d 1197, cert. denied, 488 U.S. 868, 109 S. Ct. 174, 102 L. Ed. 2d 144 (1988); *Townsend v. United States*, App. D.C., 549 A.2d 724 (1988), cert. denied, 490 U.S. 1102, 109 S. Ct. 2457, 104 L. Ed. 2d 1011 (1989); *Tucker v. United States*, App. D.C., 569 A.2d 162 (1990); *Felder v. United States*, App. D.C., 595 A.2d 974 (1991); *Robinson v. United States*, App. D.C., 608 A.2d 115 (1992); *Bennett v. United States*, App. D.C., 620 A.2d 1342 (1993); *Morris v. United States*, App. D.C., 622 A.2d 1116, cert. denied, — U.S. —, 114 S. Ct. 270, 126 L. Ed. 2d 221 (1993); *Jackson v. United States*, App. D.C., 623 A.2d 571, cert. denied, — U.S. —, 114 S. Ct. 649, 126 L. Ed. 2d 607 (1993); *Everetts v. United States*, App. D.C., 627 A.2d 981 (1993), cert. denied, — U.S. —, 115 S. Ct. 144, 130 L. Ed. 2d 84 (1994); *Collins v. United States*, App. D.C., 631 A.2d 48 (1993); *White v. United States*, App. D.C., 647 A.2d 766 (1994).

§ 22-2903. Carjacking.

(a)(1) A person commits the offense of carjacking if, by any means, that person knowingly or recklessly by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, or attempts to do so, shall take from another person immediate actual possession of a person's motor vehicle.

(2) A person convicted of carjacking shall be fined not more than \$5,000 and be imprisoned for a mandatory-minimum term of not less than 7 years and a maximum term of not more than 21 years, or both.

(b)(1) A person commits the offense of armed carjacking if that person, while armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, dirk, bowie knife, butcher knife, switch-blade

knife, razor, blackjack, billy, or metallic or other false knuckles), commits or attempts to commit the offense of carjacking.

(2) A person convicted of armed carjacking shall be fined not more than \$10,000 and be imprisoned for a mandatory-minimum term of not less than 15 years and a maximum term of not more than 45 years, or both. (Mar. 3, 1901, ch. 854, § 811a, as added May 8, 1993, D.C. Law 9-270, § 2, 39 DCR 9223; Oct. 2, 1993, D.C. Law 10-26, § 2, 40 DCR 3416.)

Section references. — This section is referred to in §§ 24-267 and 24-434.

Legislative history of Law 9-270. — Law 9-270, the “Carjacking Prevention Temporary Amendment Act of 1992,” was introduced in Council and assigned Bill No. 9-629. The Bill was adopted on first and second readings on October 6, 1992, and November 4, 1992, respectively. Signed by the Mayor on November 25, 1992, it was assigned Act No. 9-328 and transmitted to both Houses of Congress for its review. D.C. Law 9-270 became effective on May 8, 1993.

Legislative history of Law 10-26. — Law 10-26, the “Carjacking Prevention Amendment Act of 1993,” was introduced in Council and assigned Bill No. 10-16, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on April 7, 1993, and May 4, 1993, respectively. Signed by the Mayor on May 19, 1993, it was assigned Act No. 10-28 and transmitted to both Houses of Congress for its review. D.C. Law 10-26 became effective on October 2, 1993.

CHAPTER 30. SEDUCTION.

Sec.

22-3001, 22-3002. [Repealed].

§§ 22-3001, 22-3002. Seduction; seduction by teacher.

Repealed. May 23, 1995, D.C. Law 10-257, § 501(a), 42 DCR 53.

Cross references. — As to age of majority, see note following § 21-101.

As to present provisions regarding seduction and sexual abuse, see Chapter 41 of this title.

Legislative history of Law 10-257. — Law 10-257, the “Anti-Sexual Abuse Act of 1994,” was introduced in Council and assigned Bill No. 10-87, which was referred to the Committee on the Judiciary. The Bill was adopted on first

and second readings on November 1, 1994, and December 6, 1994, respectively. Signed by the Mayor on December 28, 1994, it was assigned Act No. 10-385 and transmitted to both Houses of Congress for its review. D.C. Law 10-257 became effective May 23, 1995.

Editor’s notes. — Former §§ 22-3001 and 22-3002 had also been amended by D.C. Law 10-119, § 2.

CHAPTER 31. TRESPASS; INJURIES TO PROPERTY.

Sec.

- 22-3101. Forcible entry and detainer.
- 22-3102. Unlawful entry on property.
- 22-3103. Grave robbery; buying or selling dead bodies.
- 22-3104. Depredation of fixtures in houses.
- 22-3105. Placing explosives with intent to destroy or injure property.
- 22-3106. Defacing books, manuscripts, publications, or works of art.
- 22-3107. Destroying or defacing public records.
- 22-3108. Cutting down or destroying things growing on or attached to the land of another.
- 22-3109. Destroying boundary markers.
- 22-3110. Destroying trees or protections thereof on public grounds; fastening horses thereto.
- 22-3111. Disorderly conduct in public buildings or grounds; injury to or destruction of United States property.

Sec.

- 22-3112. [Repealed].
- 22-3112.1. Defacing public or private property.
- 22-3112.2. Defacing or burning cross or religious symbol; display of certain emblems.
- 22-3112.3. Wearing hoods or masks.
- 22-3112.4. Penalties for violation of §§ 22-3112.1 to 22-3112.3.
- 22-3113. Destroying or defacing building material for streets.
- 22-3114. Destroying cemetery railing or tomb.
- 22-3115 to 22-3117. [Repealed].
- 22-3118. Malicious pollution of water.
- 22-3119. Placing obstructions on or displacement of railway tracks.
- 22-3120. Obstructing public road; removing milestones.
- 22-3121. Obstructing public highway.
- 22-3122. Fines under § 22-3121 to be collected in name of United States.

§ 22-3101. Forcible entry and detainer.

Whoever shall forcibly enter upon any premises, or, having entered without force, shall unlawfully detain the same by force against any person previously in the peaceable possession of the same and claiming right thereto, shall be punished by imprisonment for not more than 1 year or a fine of not more than \$100, or both. (Mar. 3, 1901, 31 Stat. 1327, ch. 854, § 851; 1973 Ed., § 22-3101.)

Cross references. — As to jurisdiction of Superior Court, see §§ 11-921, 11-923 and 16-1501.

Distinction between burglary and forcible entry. — While burglary does not include the elements of breaking or force, forcible entry does. *United States v. Melton*, 491 F.2d 45 (D.C. Cir. 1973).

Neither this section nor § 22-3102 engrafts any additional elements on burglary. *United States v. Kearney*, 498 F.2d 61 (D.C. Cir. 1974).

Burglary conviction not indication defendant committed forcible entry. — A verdict of burglary which cannot stand because of lack of proof of an intent to commit the crime in the premises will not be taken as indicating that the jury concluded that the defendant committed a forcible entry. *United States v. Melton*, 491 F.2d 45 (D.C. Cir. 1973).

Cited in *Mendes v. Johnson*, App. D.C., 389 A.2d 781 (1978).

§ 22-3102. Unlawful entry on property.

Any person who, without lawful authority, shall enter, or attempt to enter, any public or private dwelling, building, or other property, or part of such dwelling, building, or other property, against the will of the lawful occupant or of the person lawfully in charge thereof, or being therein or thereon, without lawful authority to remain therein or thereon shall refuse to quit the same on the demand of the lawful occupant, or of the person lawfully in charge thereof, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$100 or imprisonment in the Jail for not more

than 6 months, or both, in the discretion of the court. (Mar. 3, 1901, 31 Stat. 1324, ch. 854, § 824; Mar. 4, 1935, 49 Stat. 37, ch. 23; July 17, 1952, 66 Stat. 766, ch. 941, § 1; 1973 Ed., § 22-3102.)

Cross references. — As to burglary, see § 22-1801.

Section references. — This section is referred to in § 23-581.

Section 22-1107 attempts to prohibit conduct not covered by this section. — The distinction between public and private locations in § 22-1107 can be explained primarily as an attempt to prohibit conduct blocking private property not covered by this section. *Morgan v. District of Columbia*, App. D.C., 476 A.2d 1128 (1984).

To protect this section from unconstitutional vagueness and to protect First Amendment rights, the government must prove not only that a person lawfully in charge of public premises has ordered the defendant to leave but that there is some additional specific factor establishing the party's lack of a legal right to remain. The requirement of an independent factor is not satisfied simply by an articulable reason for restricting a person's First Amendment rights. *Wheelock v. United States*, App. D.C., 552 A.2d 503 (1988).

Conviction for failing to leave restaurant constitutional. — An unlawful entry conviction for failing to leave a restaurant following a request to leave by one lawfully in charge is not unconstitutional on First Amendment grounds. *Drew v. United States*, App. D.C., 292 A.2d 164, cert. denied, 409 U.S. 1062, 93 S. Ct. 569, 34 L. Ed. 2d 514 (1972).

As is restriction of public access to White House lawn. — In view of the dual public and private nature of the White House, and the legitimate security interest in maintaining control over the extensive grounds, a restriction of public access to portions of the White House lawn is not an unreasonable restraint of First Amendment rights. *Carson v. United States*, App. D.C., 419 A.2d 996 (1980).

Section is not impermissibly vague and does not contravene principles of due process. *Leiss v. United States*, App. D.C., 364 A.2d 803 (1976), cert. denied, 430 U.S. 970, 97 S. Ct. 1654, 52 L. Ed. 2d 362 (1977).

Conviction did not violate First Amendment rights. — Conviction of unlawful entry for having refused to leave the White House grounds when directed to do so by a person in lawful authority did not violate the defendant's First Amendment rights despite claim that he was engaging in symbolic speech. *Boertje v. United States*, App. D.C., 569 A.2d 586 (1989).

Elements of offense. — In order to convict defendants under the unlawful entry statute the government had the burden of proving that:

(1) Defendants were present at the building; (2) they were instructed to leave by the lawful occupant or person lawfully in charge of the building; (3) at the time they were instructed to leave, they did not have lawful authority to remain; and (4) upon being directed to leave the building, they refused to do so. *Darab v. United States*, App. D.C., 623 A.2d 127 (1993).

Elements of unlawful entry on public property. — As to public property, this section requires: (1) That a person lawfully in charge of the premises expressly order the party to leave; and (2) that, in addition to and independent of the evictor's wishes, there exists some additional specific factor establishing the party's lack of a legal right to remain. *O'Brien v. United States*, App. D.C., 444 A.2d 946 (1982).

Commission of entry. — There is an entry when any part of the defendant's person passes the line of the threshold. *Roane v. United States*, App. D.C., 432 A.2d 1218 (1981).

One does not have to enter a building completely for conviction of unlawful entry. *Roane v. United States*, App. D.C., 432 A.2d 1218 (1981).

Person lawfully in charge. — Where lease unequivocally gave lessee the right to use building corridor and to allow patients and employees to use it as well, lessee's right to the use of the corridor was sufficient to bring her within the meaning of "person lawfully in charge thereof," as that term is used in this section. The fact that the lease expressly gave landlord the right to "close all or any portion of the common areas temporarily to discourage non-patient use" did not mean that lessee had no right to ask defendants to leave the corridor. *Woll v. United States*, App. D.C., 570 A.2d 819 (1990).

Informing hotel of defendant's criminal record not "governmental act". — The role played by a District police officer in informing a hotel of the defendant's criminal record prior to the time the hotel ordered the defendant not to return is not sufficient to convert the private action of the hotel into essentially a "governmental act" for constitutional purposes. *Kelly v. United States*, App. D.C., 348 A.2d 884 (1975).

Effect of mere demand to leave by one lawfully in charge is sufficient. — As applied to private property, this section requires that the mere demand of the person lawfully in charge to leave necessarily deprives the other party of any lawful authority to remain on the premises. *O'Brien v. United States*, App. D.C., 444 A.2d 946 (1982).

Section does not restate the common law of criminal trespass. *Bowman v. United States*, App. D.C., 212 A.2d 610 (1965).

Section applies to all public buildings, i.e., government buildings, in the District, including the White House or Executive Mansion. *Whittlesey v. United States*, App. D.C., 221 A.2d 86 (1966).

Early closing of Capitol dome for security reasons. — Defendant's First Amendment rights were not violated when he was arrested for unlawful entry after refusing to leave after an early closing of the Capitol dome for security reasons on the day of the President's State of the Union message. *Shiel v. United States*, App. D.C., 515 A.2d 405 (1986), cert. denied, 485 U.S. 1010, 108 S. Ct. 1477, 99 L. Ed. 2d 706 (1988).

District police have authority to enter an embassy and arrest foreign nationals who are trespassing. *Fatemi v. United States*, App. D.C., 192 A.2d 525 (1963).

First Secret Service Uniformed Division officer on scene considered person "lawfully in charge". — The first officer of the United States Secret Service Uniformed Division to arrive at the scene of a disturbance or demonstration on the White House grounds is considered to be the senior officer "on the scene" and the person "lawfully in charge" for purposes of giving a notice to quit and making the decision to enforce this section. *Smith v. United States*, App. D.C., 445 A.2d 961 (1982).

Right of agent to demand unlawful occupants leave. — The unlawful entry statute permits a person lawfully in charge of premises to act through an agent, including the police, in demanding that unlawful occupants leave. *United States v. O'Keith*, 116 WLR 1233 (Super. Ct. 1988).

Absence of lawful authority necessary element of offense. — One of the necessary elements for an unlawful entry conviction is proof that the defendant entered or attempted to enter the premises without lawful authority, against the will of its lawful occupant. *Dent v. United States*, App. D.C., 271 A.2d 699 (1970).

Entry without lawful authority is a requisite element of the offense of unlawful entry. *Jones v. United States*, App. D.C., 282 A.2d 561 (1971).

The offense of unlawful entry is committed when a person invades property without lawful authority and against the will of the occupant; on such a charge, there need be no showing of intent to commit a particular crime inside. *Shelton v. United States*, App. D.C., 505 A.2d 767 (1986).

As is entry against will. — In a prosecution for unlawfully entering a private dwelling, one of essential elements is whether the entry was against the will of one who was a lawful occupant. *Moore v. United States*, App. D.C., 136 A.2d 868 (1957).

And entry must be against expressed will. — For an entry to be against the will of the lawful occupant the entry must be against

the expressed will, that is, after the warning to keep off. *Bowman v. United States*, App. D.C., 212 A.2d 610 (1965).

To be against the will of the lawful occupant, the entry must be against the expressed will, that is, after a warning to keep off the premises. *Smith v. United States*, App. D.C., 281 A.2d 438 (1971).

In order to be express, the will of the person in legal possession need not be oral; it may be expressed by sign. *Artisist v. United States*, App. D.C., 554 A.2d 327 (1989).

Intent to commit crime unnecessary. — Unlawful entry does not require an intent to commit a particular crime; indeed, it is the absence of that very intent which principally distinguishes unlawful entry from burglary. *Williams v. United States*, App. D.C., 549 A.2d 328 (1988).

General intent offense. — The only state of mind that the government must prove is appellant's general intent to be on the premises contrary to the will of the lawful owner. *Artisist v. United States*, App. D.C., 554 A.2d 327 (1989).

Question of lawful occupancy for jury. — In a prosecution for unlawfully entering a private dwelling, whether the complainant was a lawful occupant is a question for the jury. *Moore v. United States*, App. D.C., 136 A.2d 868 (1957).

And purpose of occupancy no bearing on question. — In a prosecution for unlawfully entering a private dwelling, the issues as to whether the complaining party occupied an apartment under an alias or occupied it for the purpose of having adulterous relations with another has no bearing on the question of whether she was a lawful occupant. *Moore v. United States*, App. D.C., 136 A.2d 868 (1957).

One who refuses to leave following lawful entry guilty. — One who lawfully enters may be guilty of a misdemeanor by refusing to leave after being ordered to do so by the person lawfully in charge of the premises. *Feldt v. Marriott Corp.*, App. D.C., 322 A.2d 913 (1974).

Absent a constitutional or statutory right to remain, a person lawfully on the premises of a commercial establishment is guilty of unlawful entry if he refuses to leave the premises after a demand by the person lawfully in charge. *Safeway Stores, Inc. v. Kelly*, App. D.C., 448 A.2d 856 (1982).

Conviction of unlawful entry, for having refused to leave the office of a United States Senator at the direction of the Senator's administrative assistant, did not violate defendant's First Amendment rights. *Hemmati v. United States*, App. D.C., 564 A.2d 739 (1989).

Where undisputed evidence showed that an off-duty police officer had ordered defendant and his companion out of a restaurant when a patron complained that they were annoying

her, and where defendant did not comply with this order, the officer clearly had probable cause to arrest defendant at that point for unlawful entry. *Bauldock v. Davco Food, Inc.*, App. D.C., 622 A.2d 28 (1993).

Refusal to leave Capitol during bomb threat evacuation. — Defendant's First Amendment rights were not violated when he refused to leave Capitol Building during a bomb threat evacuation so that charge of unlawful entry was proper. *United States v. Abney*, 112 WLR 1101 (Super. Ct. 1984).

Citizens not ejected from public property absent no legal right to be there. — Individual citizens may not be ejected from public property on the order of the person lawfully in charge absent some additional, specific factor establishing their lack of a legal right to be there. *Carson v. United States*, App. D.C., 419 A.2d 996 (1980).

Under this section, with respect to public property, in addition to and independent of evictor's wishes, there must exist some specific factor establishing defendant's lack of a legal right to remain, and where the only additional specific factor invoked is a transit authority regulation forbidding free speech activity on transit authority property without a permit, and the permit requirement is invalid because overbroad and unconstitutional, the prosecution must fail. *United States v. Rothmeier*, App. D.C., 570 A.2d 811 (1990).

Factors establishing person's lack of a legal right to be on public property may consist of posted regulations, signs, fences or barricades regulating the public's use of government property, or other reasonable restrictions. *Carson v. United States*, App. D.C., 419 A.2d 996 (1980); *Wheelock v. United States*, App. D.C., 552 A.2d 503 (1988); *United States v. Powell*, App. D.C., 563 A.2d 1086 (1989).

Commander of White House Police authorized to order persons to leave. — One who is the commanding officer of the White House Police has the authority to order persons to leave when they violate the regulations respecting visitors at the White House. *Whittlesey v. United States*, App. D.C., 221 A.2d 86 (1966).

A foreign nation's embassy is not public property from which a person may not be ejected without proof of an additional specific factor that establishes the person's lack of a legal right to stay there. *Byrne v. United States*, App. D.C., 578 A.2d 700 (1990).

An express demand to leave by the person lawfully in charge is all that is necessary to deprive the other party of authority to remain within the premises of a foreign embassy. *Byrne v. United States*, App. D.C., 578 A.2d 700 (1990).

Court order to refrain from trespassing at abortion clinic. — Participants in abortion

clinic blockades, who were under court order not to trespass on the clinics and who were ordered by clinic personnel and/or police at the time of the blockades to leave the property, were clearly guilty of trespassing, as their presence on the property was without lawful authority. *NOW v. Operation Rescue*, 816 F. Supp. 729 (D.D.C. 1993), modified, 37 F.3d 646 (D.C. Cir. 1994).

Entry into hotel following warning unlawful. — Where a party who is not a guest in a hotel is warned not to return and is subsequently found in the hotel, her subsequent entrance constitutes unlawful entry. *Kelly v. United States*, App. D.C., 348 A.2d 884 (1975).

As is man's presence in ladies' bathroom. — A conviction for unlawful entry can be based on a man's presence in a ladies' bathroom. *Hockaday v. United States*, App. D.C., 359 A.2d 146 (1976).

Occupying girlfriend's apartment not "tenancy by sufferance." — An arrangement whereby the defendant was occupying his girlfriend's apartment rent-free, and at her indulgence, does not constitute a "tenancy by sufferance," so as to preclude a conviction for unlawful entry. *Jackson v. United States*, App. D.C., 357 A.2d 409 (1976).

Use of an agent. — This section permits a person lawfully in charge of premises to act through an agent, including the police. *Bauldock v. Davco Food, Inc.*, App. D.C., 622 A.2d 28 (1993).

Right of tenant to request persons be removed. — Under the lease, tenants was the "lawful occupant" and the person "lawfully in charge of the premises" in question within the meaning of the statute and she was entitled to ask the police to remove from the corridor people deliberately blocking ingress to her clinic. Even if others could also demand that individuals leave the property, or might countermand tenant's order, this does not detract from her position as the person in charge of the premises in their absence. *United States v. O'Keith*, 116 WLR 1233 (Super. Ct. 1988).

Whether unlawful entry lesser included offense depends upon analysis of facts. — Whether unlawful entry is a lesser included offense with respect to any particular crime that is charged depends not solely upon a comparison of the statutory requirements for the respective crimes, but also upon an analysis of the facts of the offense as charged in the indictment and as proved at trial. *United States v. Kearney*, 498 F.2d 61 (D.C. Cir. 1974).

Intent distinguishes burglary from unlawful entry. — The element that distinguishes burglary from unlawful entry is the intent to commit a crime once the unlawful entry has been accomplished. *United States v. Melton*, 491 F.2d 45 (D.C. Cir. 1973).

Unlawful entry does not supply intent to steal on prior occasions. — The fact that defendant entered a building without permission to do so cannot be relied upon to prove his specific intent to steal on prior occasions; to hold otherwise would obliterate the clear distinction the legislature has drawn between burglary and unlawful entry. *Williams v. United States*, App. D.C., 549 A.2d 328 (1988).

Unlawful entry is lesser included offense of burglary. *Roane v. United States*, App. D.C., 432 A.2d 1218 (1981).

One may be guilty of burglary and yet not be guilty of unlawful entry. *Buckman v. District of Columbia Dep't of Emp. Servs.*, App. D.C., 505 A.2d 771 (1986).

Neither this section nor § 22-3101 engrafts any additional elements on burglary. *United States v. Kearney*, 498 F.2d 61 (1974).

Conduct not coming within § 9-124. — The conduct of defendants charged with unlawful entry in refusing to quit the steps of the United States Capitol after being ordered to do so, and in reading the names of war dead in an ordinary speaking voice, does not come within § 9-124, which prohibits certain activities on the Capitol Grounds. *United States v. Nicholson*, App. D.C., 263 A.2d 56 (1970).

Person with bona fide belief of right to enter not guilty. — A person who enters a building for a good purpose and with a bona fide belief of his right to enter is not guilty of an unlawful entry. *McGloin v. United States*, App. D.C., 232 A.2d 90 (1967).

A bona fide belief of a right to enter constitutes a valid defense. *Smith v. United States*, App. D.C., 281 A.2d 438 (1971).

When a person enters a place with a good purpose and with a bona fide belief of the right to enter, he lacks the element of criminal intent required by this section and is not guilty of unlawful entry. *Smith v. United States*, App. D.C., 281 A.2d 438 (1971).

But belief must be reasonable. — It is not sufficient that the accused merely claim a belief of a right to enter; a bona fide belief must have some reasonable basis. *Smith v. United States*, App. D.C., 281 A.2d 438 (1971).

"Reasonable belief" not shown. — The government presented sufficient evidence from which a reasonable jury could conclude that defendants' motivation did not rise to the level of a reasonable, good faith belief in lawful authority to remain in the building after being asked to leave. *Darab v. United States*, App. D.C., 623 A.2d 127 (1993).

And based in indicia of innocence. — A reasonable belief in an individual's right to remain on property not owned or possessed by that individual offered as a defense to this section must be based in the pure indicia of innocence. *Gaetano v. United States*, App. D.C.,

406 A.2d 129 (1979), cert. denied, 445 U.S. 967, 100 S. Ct. 1659, 64 L. Ed. 2d 244 (1980).

Sincere political or moral beliefs no defense. — The law does not recognize as a defense that the defendants were motivated to commit their acts by sincere political, religious or moral convictions or in obedience to some higher law. *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972).

The "bona fide belief" defense was not meant to, and does not, exonerate individuals who believe they have a right, or even a duty, to violate the law in order to effect a moral, social, or political purpose, regardless of the genuineness of the belief or the popularity of the purpose. *Gaetano v. United States*, App. D.C., 406 A.2d 1291 (1979).

It is no defense to a charge of unlawful entry that the crime was committed out of a sincere personal or political belief, however genuine, in the rightness of one's actions; a bona fide belief in one's legal authority to remain in an area must have a reasonable basis. *Hemmati v. United States*, App. D.C., 564 A.2d 739 (1989).

The touchstone of the bona fide belief defense, which holds that a person lacks the requisite attempt for unlawful entry if he enters a place with a good purpose and a bona fide belief in his right to enter, is the belief in lawful authority to stay, not moral or religious authority. *Darab v. United States*, App. D.C., 623 A.2d 127 (1993).

Political demonstrations. — The government is not free to punish more severely those unlawful entrants who are political demonstrators, while excusing those who also refuse to leave on demand of lawful authority, but who are not making a political statement. *Fedorov v. United States*, App. D.C., 600 A.2d 370 (1991).

Because fundamental constitutional rights are implicated, the government must meaningfully account for disparate treatment it accords political demonstrators charged with unlawful entry, when compared with all other similarly situated offenders. *Fedorov v. United States*, App. D.C., 600 A.2d 370 (1991).

"Reasonable belief" issue jury question. — Whether there was a reasonable belief in a right to remain is a jury question. *Leiss v. United States*, App. D.C., 364 A.2d 803 (1976), cert. denied, 430 U.S. 970, 97 S. Ct. 1654, 52 L. Ed. 2d 362 (1977).

Alleged right to prevent wife's debauchment personal to husband. — The alleged right of a husband to make what would otherwise be an illegal entry in order to prevent the debauchment of his wife is personal to the husband and cannot be invoked by other defendants. *Leon v. United States*, App. D.C., 136 A.2d 588 (1957).

Probable cause to believe offense committed justifies making warrantless entry. — Where the arresting officers have probable

cause to believe that the defendant has made an unlawful entry, their entry without a warrant is justified. *Jones v. United States*, App. D.C., 282 A.2d 561 (1971).

Officer may arrest for offense committed in presence. — A police officer has sufficient ground to arrest the defendant for an unlawful entry committed in his presence. *Best v. United States*, App. D.C., 237 A.2d 825 (1968).

A warrantless arrest is justified by the fact of an unlawful entry committed in the presence of the arresting officers. *United States v. Williams*, 442 F.2d 738 (D.C. Cir. 1970).

When a restaurant patron, in the presence of a police officer, refuses to leave on the demand of the restaurant manager, the officer is justified in arresting the patron for unlawful entry. *Feldt v. Marriott Corp.*, App. D.C., 322 A.2d 913 (1974).

The fact that defendant was not told specifically that he was being arrested for unlawful entry (as opposed to some other crime) does not affect the propriety of the arrest. *Bauldock v. Davco Food, Inc.*, App. D.C., 622 A.2d 28 (1993).

Court not required to inquire into arrest's legality where no evidence obtained. — The court, in a prosecution for unlawful entry, is not required to inquire into the legality or illegality of the defendant's arrest where no evidence was obtained as the result of the arrest. *Smith v. United States*, App. D.C., 173 A.2d 739 (1961).

Questions seeking explanation for being in condemned house not "custodial interrogation." — Questions addressed to the defendant by the arresting officers seeking an explanation for his being in a condemned house are noncoercive and are not a "custodial interrogation". *Keith v. United States*, App. D.C., 232 A.2d 92 (1967).

Prosecution by indictment for unlawful entry is not constitutionally required. *Harvin v. United States*, App. D.C., 245 A.2d 307 (1968), *aff'd*, 445 F.2d 675 (D.C. Cir.), *cert. denied*, 404 U.S. 943, 92 S. Ct. 292, 30 L. Ed. 2d 257 (1971).

An unlawful entry is not an "infamous crime" within the constitutional provision relating to prosecutions by indictment. *Harvin v. United States*, 445 F.2d 675 (D.C. Cir.), *cert. denied*, 404 U.S. 943, 92 S. Ct. 292, 30 L. Ed. 2d 257 (1971).

Offense of unlawful entry may be charged by information. *United States v. Thomas*, 444 F.2d 919 (D.C. Cir. 1971).

Defendants entitled to know with certainty offense and penalty. — Defendants are entitled to know with certainty the offense with which they are charged and possible penalty threatened and are entitled to a definite reference to the law which they have allegedly

violated. *Smith v. District of Columbia*, 387 F.2d 233 (D.C. Cir. 1967).

Consideration of entry into girlfriend's apartment as intrafamily offense not required. — The government is not required to refer a case of a defendant charged with unlawful entry into his girlfriend's apartment to the Director of Social Services for consideration as an intrafamily offense. *Jackson v. United States*, App. D.C., 357 A.2d 409 (1976).

Court's refusal to dismiss despite complainant's wishes not error. — In a prosecution for unlawful entry, the court does not err in refusing to dismiss because the complaining witness no longer wishes to go forward. *Jackson v. United States*, App. D.C., 357 A.2d 409 (1976).

Guilty plea should not be refused because defendant refuses to admit guilt. — Where a defendant charged with burglary tenders a plea of guilty to unlawful entry, and the judge is presented with a factual basis for the plea, it should not be refused simply because the defendant refuses to accompany it with an admission of guilt. *United States v. Gaskins*, 485 F.2d 1046 (D.C. Cir. 1973).

No ineffective assistance of counsel where no objection nor harm. — The fact that new counsel is appointed shortly before trial does not amount to ineffective assistance of counsel where no continuance is requested, the defendant announces he is ready for trial, the factual situation is not complex, there are no witnesses for the defense who could be called, and the new counsel is experienced and diligent. *Tuttle v. United States*, App. D.C., 238 A.2d 590 (1968).

Testimony of witness' conversation with defendant may bear directly upon authority to enter. — The prosecuting witness' testimony, in a prosecution under this section, of her conversation with the defendant as to whether or not he was entitled to go into her apartment, may bear directly upon the defendant's lack of lawful authority to enter the witness' apartment. *Dent v. United States*, App. D.C., 271 A.2d 699 (1970).

Section 14-305(b)(1)(A) does not encompass a conviction for unlawful entry. *Bates v. United States*, App. D.C., 403 A.2d 1159 (1979).

Rehabilitation of credibility. — If one were lawfully on premises exercising First Amendment rights, then refused to leave upon lawful demand to do so, and was thereupon convicted of unlawful entry under this section, he or she would have an opportunity to rehabilitate credibility by making a "limited explanation" of the circumstances supporting the conviction if the government sought to use it for impeachment. *Bates v. United States*, App. D.C., 403 A.2d 1159 (1979).

Evidence sufficient to satisfy demand requirement. — Where the government's evidence provides an ample basis to conclude that the acting director of an abortion clinic, either personally or through an agent, ordered defendant to leave the premises, the evidence is sufficient to satisfy the requirement of this section that an authorized person demanded that defendant quit the premises. *Grogan v. United States*, App. D.C., 435 A.2d 1069 (1981).

Evidence not warranting instruction on unlawful entry. — In a burglary prosecution, evidence that, during a period of widespread disturbances and looting, the defendant was found hiding in a store that had a broken window and a locked door, does not warrant an instruction on the lesser offense of unlawful entry. *United States v. Sinclair*, 444 F.2d 888 (D.C. Cir. 1971).

Defendant entitled to jury instruction as to reasonable belief. — A defendant is entitled to an instruction, where the existence of a belief that the person has a right to enter is genuinely questionable, to the effect that the government must prove beyond a reasonable doubt that the defendant did not have a reasonable, good faith belief in his lawful authority to stay. However, to warrant such an instruction it is not sufficient that an accused merely claim a belief to the right to enter; a bona fide belief must have some reasonable basis. *Darab v. United States*, App. D.C., 623 A.2d 127 (1993).

Failure to give requested lesser included offense instruction requires remand. — The trial court's failure to give a requested instruction that unlawful entry is a lesser included offense of burglary requires remand for entry of a judgment of conviction of unlawful entry or, if the trial court believes it in the interests of justice, a new trial. *Roane v. United States*, App. D.C., 432 A.2d 1218 (1981).

Evidence sufficient to sustain conviction. — See *Artisist v. United States*, App. D.C., 554 A.2d 327 (1989).

Defendants are properly convicted for unlawful entry where they, without a ticket and intent to board a train, enter a restricted area. *Bowman v. United States*, App. D.C., 212 A.2d 610 (1965).

Evidence which shows that the defendant was found in a part of an office which was not open to the public and where he had no right to be sustains a conviction for unlawful entry. *Bond v. United States*, App. D.C., 233 A.2d 506 (1967).

Evidence that the defendant was discovered by the occupant of a home about halfway through a window sustains a conviction for unlawful entry. *United States v. Thomas*, 444 F.2d 919 (D.C. Cir. 1971).

Defendant convicted under this section who appeals deprives the lower court of jurisdiction. *Pringle v. Superintendent of*

Wash. Asylum & Jail, 2 F.2d 317 (D.C. Cir. 1924).

Where sentences concurrent, court will not pass upon sufficiency of evidence. — Where a defendant receives concurrent sentences for numerous offenses, including unlawful entry and the evidence is sufficient to support one of the convictions, the appellate court will not pass upon the sufficiency of the evidence to support the other convictions. *Keith v. United States*, App. D.C., 232 A.2d 92 (1967).

Burglary conviction no indication defendant committed forcible entry. — A verdict of burglary which cannot stand because of lack of proof of an intent to commit the crime in the premises will not be taken as indicating that the jury concluded that the defendant committed a forcible entry. *United States v. Melton*, 491 F.2d 45 (D.C. Cir. 1973).

But where evidence sufficient, case may be remanded for unlawful entry conviction. — Although a conviction for burglary is vacated because of the insufficiency of the indictment, where the indictment is sufficient to charge an unlawful entry and the evidence is sufficient to support a conviction, the case may be remanded for a conviction for unlawful entry. *United States v. Seegers*, 445 F.2d 232 (D.C. Cir. 1971).

Where a burglary conviction is set aside for lack of proof of intent to commit the crime in the premises entered but the jury necessarily finds the facts required for a conviction of unlawful entry and the evidence is sufficient to support this determination, the appellate court will remand with instructions to enter a conviction of unlawful entry or, if the trial court believes it in the interest of justice, to grant a new trial. *United States v. Melton*, 491 F.2d 45 (D.C. Cir. 1973).

Conviction cannot be founded upon ambiguous verdict. — Where the jury is instructed on both housebreaking and unlawful entry and returns a verdict of "guilty," the verdict is ambiguous and a conviction cannot be founded upon it. *Glenn v. United States*, 420 F.2d 1323 (D.C. Cir. 1969).

And remand for new trial appropriate remedy. — In a case in which a guilty verdict is ambiguous for failing to state whether it refers to the offense of housebreaking or to the offense of unlawful entry, remand for a new trial is the appropriate remedy. *Glenn v. United States*, 420 F.2d 1323 (D.C. Cir. 1969).

Cited in *McFarland v. United States*, App. D.C., 163 A.2d 627 (1960); *Benbow v. United States*, App. D.C., 227 A.2d 772 (1967); *Perry v. United States*, App. D.C., 230 A.2d 721 (1967); *Humphrey v. United States*, App. D.C., 236 A.2d 438 (1967); *Angarano v. United States*, App. D.C., 312 A.2d 295 (1973); *Hyman v. United States*, App. D.C., 342 A.2d 43 (1975); *Wynn v. United States*, App. D.C., 386 A.2d 695

(1978); *Waller v. United States*, App. D.C., 389 A.2d 801 (1978), cert. denied, 446 U.S. 901, 100 S. Ct. 1824, 64 L. Ed. 2d 253 (1980); *In re Inquiry into Cedar Knoll Inst.*, App. D.C., 430 A.2d 1087 (1981); *McEachin v. United States*, App. D.C., 432 A.2d 1212 (1981); *Griffin v. United States*, App. D.C., 447 A.2d 776 (1982), cert. denied, 461 U.S. 907, 103 S. Ct. 1879, 76 L. Ed. 2d 810 (1983); *Dyson v. United States*, App. D.C., 450 A.2d 432 (1982); *Abney v. United States*, App. D.C., 451 A.2d 78 (1982); *Abney v. United States*, App. D.C., 464 A.2d 106 (1983); *Moreno v. United States*, App. D.C., 482 A.2d 1233 (1984), cert. denied, 469 U.S. 1226, 105 S. Ct. 1222, 84 L. Ed. 2d 362 (1985); *Culp v.*

United States, App. D.C., 486 A.2d 1174 (1985); *United States v. Murphy*, 114 WLR 2150 (Super. Ct. 1986); *Green v. United States*, App. D.C., 544 A.2d 714 (1988); *Bellanger v. United States*, App. D.C., 548 A.2d 501 (1988); *United States v. Ruth*, 116 WLR 917 (Super. Ct. 1988); *Maura v. United States*, App. D.C., 555 A.2d 1015 (1989); *NOW v. Operation Rescue*, 747 F. Supp. 760 (D.D.C. 1990), modified, 37 F.3d 646 (D.C. Cir. 1994); *Abney v. United States*, App. D.C., 616 A.2d 856 (1992); *District of Columbia v. Murphy*, App. D.C., 631 A.2d 34, aff'd on reh'g, App. D.C., 635 A.2d 929 (1993); *Berg v. United States*, App. D.C., 631 A.2d 394 (1993).

§ 22-3103. Grave robbery; buying or selling dead bodies.

Whoever, without legal authority or without the consent of the nearest surviving relative, shall disturb or remove any dead body from a grave for the purpose of dissecting, or of buying, selling, or in any way trafficking in the same, shall be imprisoned not less than 1 year nor more than 3 years. (Mar. 3, 1901, 31 Stat. 1334, ch. 854, § 891; 1973 Ed., § 22-3103.)

Cross references. — As to unlawful traffic in dead bodies, see § 2-1406.

§ 22-3104. Depredation of fixtures in houses.

Whoever shall wilfully and without color of right enter into any occupied or unoccupied dwelling-house or other building, property of another, and shall cut, break, or tear from its place any gas pipe, water pipe, doorbell, or other fixture therein; or whoever shall in such dwelling-house or other building wilfully and without color of right cut, break, or tear down any wall or part of a wall, or door, with intent to cut, break, or tear from its place any pipe or fixture therein, shall be fined not more than \$200 or be imprisoned not more than 2 years, or both. (Mar. 3, 1901, 31 Stat. 1324, ch. 854, § 825; 1973 Ed., § 22-3104.)

§ 22-3105. Placing explosives with intent to destroy or injure property.

Whoever places, or causes to be placed, in, upon, under, against, or near to any building, car, vessel, monument, statue, or structure, gunpowder or any explosive substance of any kind whatsoever, with intent to destroy, throw down, or injure the whole or any part thereof, although no damage is done, shall be punished by a fine not exceeding \$1,000 and by imprisonment for not less than 2 years or more than 10 years. (Mar. 3, 1901, ch. 854, § 825a; Mar. 3, 1905, 33 Stat. 1033, ch. 1461; Dec. 27, 1967, 81 Stat. 739, Pub. L. 90-226, title VI, § 607; 1973 Ed., § 22-3105.)

§ 22-3106. Defacing books, manuscripts, publications, or works of art.

Any person who shall wrongfully deface, injure, or mutilate, tear, or destroy any book, pamphlet, or manuscript, or any portion thereof belonging to the Library of Congress, or to any public library in the District of Columbia, whether the property of the United States or of the District of Columbia or of any individual or corporation in said District, or who shall wrongfully deface, injure, mutilate, tear, or destroy any book, pamphlet, document, manuscript, public record, print, engraving, medal, newspaper, or work of art, the property of the United States or of the District of Columbia, shall be held guilty of a misdemeanor, and, on conviction thereof, shall, when the offense is not otherwise punishable by some statute of the United States, be punished by a fine of not less than \$10 nor more than \$1,000, and by imprisonment for not less than 1 month nor more than 180 days, or both, for every such offense. (Mar. 3, 1901, 31 Stat. 1327, ch. 854, § 849; June 30, 1902, 32 Stat. 535, ch. 1329; 1973 Ed., § 22-3106; Dec. 1, 1982, D.C. Law 4-164, § 601(d), 29 DCR 3976; Sept. 5, 1985, D.C. Law 6-19, § 14(b), 32 DCR 3590; Aug. 20, 1994, D.C. Law 10-151, § 105(n), 41 DCR 2608.)

Cross references. — As to public records management, see Chapter 29 of Title 1.

Effect of amendments. — D.C. Law 10-151 substituted “180 days” for “1 year” near the end.

Emergency act amendments. — For temporary amendment of section, see § 105(n) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 4-164. — Law 4-164, the “District of Columbia Theft and White Collar Crimes Act of 1982,” was introduced in Council and assigned Bill No. 4-133, which was referred to the Committee on the Judiciary. The Bill was adopted on first, amended first and second readings on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.

Legislative history of Law 6-19. — Law 6-19, the “District of Columbia Public Records

Management Act of 1985,” was introduced in Council and assigned Bill No. 6-139, which was referred to the Committee on Government Operations. The Bill was adopted on first and second readings on May 14, 1985 and May 28, 1985, respectively. Signed by the Mayor on June 10, 1985, it was assigned Act No. 6-34 and transmitted to both Houses of Congress for its review.

Legislative history of Law 10-151. — Law 10-151, the “Omnibus Criminal Justice Reform Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

§ 22-3107. Destroying or defacing public records.

Whoever maliciously or with intent to injure or defraud any other person defaces, mutilates, destroys, abstracts, or conceals the whole or any part of any record authorized by law to be made, or pertaining to any court or public office in the District, or any paper duly filed in such court or office, shall be fined not more than \$1,000 or imprisoned not more than 180 days, or both. (Mar. 3, 1901, 31 Stat. 1327, ch. 854, § 844; 1973 Ed., § 22-3107; Aug. 20, 1994, D.C. Law 10-151, § 105(o), 41 DCR 2608.)

Cross references. — As to tampering with physical evidence, see § 22-723.

Effect of amendments. — D.C. Law 10-151 substituted "\$1,000" for "\$300" and substituted "180 days" for "2 years."

Emergency act amendments. — For temporary amendment of section, see § 105(o) of

the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — See note to § 22-3106.

§ 22-3108. Cutting down or destroying things growing on or attached to the land of another.

Whoever maliciously cuts down or destroys by girdling or otherwise, any standing or growing vine, bush, shrub, sapling, or tree on the land of another, or severs from the land of another any product standing or growing thereon, or any other thing attached thereto, shall, if the value of the thing destroyed, or the amount of damage done to any such thing or to the land is \$50 or more, be imprisoned for not less than 180 days nor more than 3 years, or, if such value or amount is less than that sum, shall be fined not less than \$5 nor more than \$100, or be imprisoned not more than 180 days, or both. (Mar. 3, 1901, 31 Stat. 1327, ch. 854, § 847; Aug. 12, 1937, 50 Stat. 629, ch. 599; 1973 Ed., § 22-3108; Aug. 20, 1994, D.C. Law 10-151, § 105(p), 41 DCR 2608.)

Effect of amendments. — D.C. Law 10-151 substituted "180 days" for "1 year."

Emergency act amendments. — For temporary amendment of section, see § 105(p) of the Omnibus Criminal Justice Reform Emer-

gency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — See note to § 22-3106.

§ 22-3109. Destroying boundary markers.

Whoever maliciously cuts down, destroys, or removes any boundary tree, stone, or other mark or monument, or maliciously effaces any inscription thereon, either of his or her own lands or of the lands of any other person whatsoever, even though such boundary or bounded trees should stand within the person's own land so cutting down and destroying the same, shall be fined not more than \$1,000 and imprisoned not exceeding 180 days. (Mar. 3, 1901, 31 Stat. 1333, ch. 854, § 880; 1973 Ed., § 22-3109; May 21, 1994, D.C. Law 10-119, § 2(u), 41 DCR 1639; Aug. 20, 1994, D.C. Law 10-151, § 105(q), 41 DCR 2608.)

Effect of amendments. — D.C. Law 10-119 inserted "or her" preceding "own lands."

D.C. Law 10-151 substituted "180 days" for "1 year."

Emergency act amendments. — For temporary amendment of section, see § 105(q) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-119. — Law 10-119, the "Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of

1994," was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Legislative history of Law 10-151. — See note to § 22-3106.

§ 22-3110. Destroying trees or protections thereof on public grounds; fastening horses thereto.

It shall not be lawful for any person or persons to girdle, break, wound, destroy, or in any manner injure any of the trees growing or planted and set, or which may hereafter be planted and set on any of the public grounds, open space, or squares or on any private lot, or on any of the streets, or avenues, roads or highways, in the District of Columbia, or any of the boxes, stakes, or any other protection thereof, under a penalty of not exceeding \$50 for each and every such offense; and if any person or persons shall tie or in any manner fasten a horse or horses to any of the trees, boxes, or other protection thereof on any streets or avenues, roads, or highways, on any of the public grounds belonging to the United States, or on any of the streets, avenues, or alleys, in the District of Columbia, each and every such offender shall forfeit and pay for each offense a sum not exceeding \$10. (July 29, 1892, 27 Stat. 324, ch. 320, § 13; 1973 Ed., § 22-3110.)

Cross references. — As to prosecutions under this section, see § 22-109.

As to cutting down or destroying things on the land of another, see § 22-3108.

§ 22-3111. Disorderly conduct in public buildings or grounds; injury to or destruction of United States property.

Any person guilty of disorderly and unlawful conduct in or about the public buildings and public grounds belonging to the United States within the District of Columbia, or who shall wilfully injure the buildings or shrubs, or shall pull down, impair, or otherwise injure any fence, wall, or other inclosure, or shall injure any sink, culvert, pipe, hydrant, cistern, lamp, or bridge, or shall remove any stone, gravel, sand, or other property of the United States, or any other part of the public grounds or lots belonging to the United States in the District of Columbia, shall be fined not more than \$500, or imprisoned not more than 6 months, or both. (July 29, 1892, 27 Stat. 325, ch. 320, § 15; Oct. 20, 1967, 81 Stat. 277, Pub. L. 90-108, § 2; 1973 Ed., § 22-3111.)

Cross references. — As to prosecutions under this section, see § 22-109.

United States, through the United States Attorney, is the proper prosecutive authority for any alleged violation of this section. *District of Columbia v. Ackerman*, App. D.C., 283 A.2d 24 (1971).

Defendants entitled to know with certainty offense and penalty. — Defendants

are entitled to know with certainty the offense with which they are charged and the possible penalty threatened, and are entitled to a definite reference to the law which they have allegedly violated. *Feeley v. District of Columbia*, 387 F.2d 216 (D.C. Cir. 1967); *Smith v. District of Columbia*, 387 F.2d 233 (D.C. Cir. 1967).

§ 22-3112. Destroying or defacing buildings, statues, or monuments.

Repealed. Mar. 10, 1983, D.C. Law 4-203, § 6, 30 DCR 180.

Legislative history of Law 4-203. — See note to § 22-3112.1.

§ 22-3112.1. Defacing public or private property.

It shall be unlawful for any person or persons willfully and wantonly to disfigure, cut, chip, or cover, rub with, or otherwise place filth or excrement of any kind; to write, mark, or print obscene or indecent figures representing obscene or objects upon; to write, mark, draw, or paint, without the consent of the owner or proprietor thereof, or, in the case of public property, of the person having charge, custody, or control thereof, any word, sign, or figure upon:

(1) Any property, public or private, building, statue, monument, office, public passenger vehicle, mass transit equipment or facility, dwelling or structure of any kind including those in the course of erection; or

(2) The doors, windows, steps, railing, fencing, balconies, balustrades, stairs, porches, halls, walls, sides of any enclosure thereof, or any movable property. (Mar. 10, 1983, D.C. Law 4-203, § 2, 30 DCR 180.)

Cross references. — As to tampering with and misuse of wastewater system, see § 6-955.

Section references. — This section is referred to in § 22-3112.4.

Legislative history of Law 4-203. — Law 4-203, the “Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982,” was introduced in Council and assigned Bill No. 4-455, which was referred to the Committee on Housing and Economic Development. The Bill was adopted on first and second readings on November 16, 1982, and December 14, 1982, respectively. Signed by the Mayor on December 28, 1982, it was assigned Act No. 4-287 and transmitted to both Houses of Congress for its review.

Scope of section. — This section specifically covers “filth or excrement of any kind,” and by this expansive language the City Council clearly intended for this section to reach beyond

just urine or fecal matter. Thus, the throwing of blood on the pillars of the White House constitutes defacement of public property, which this section prohibits. *United States v. Bohlke*, 116 WLR 1697 (Super. Ct. 1988).

Because redundancy in criminal statutes is permissible, it does not matter that blood stains injure property for purposes of § 22-403, and also under this section. *United States v. Berberich*, 120 WLR 537 (Super. Ct. 1992).

Defacing property not lesser included offense of malicious destruction. — Because the maximum fine for defacing property is greater than the maximum fine for malicious destruction of property, the former is not a “lesser” offense than the latter. *Craig v. United States*, App. D.C., 523 A.2d 567 (1987).

Cited in *United States v. Frankel*, 739 F. Supp. 629 (D.D.C. 1990).

§ 22-3112.2. Defacing or burning cross or religious symbol; display of certain emblems.

(a) It shall be unlawful for any person to burn, desecrate, mar, deface, or damage a cross or other religious symbol on any private premises or property in the District of Columbia primarily used for religious, educational, residential, memorial, charitable, or cemetery purposes, or for assembly by persons of a particular race, color, creed, or religion, or on any public property in the District of Columbia; or to place or to display in any of these locations a sign, mark, symbol, emblem, or other physical impression including, but not limited to, a Nazi swastika or any manner of exhibit which includes a burning cross, real or simulated, with the intent:

(1) To deprive any person or class of persons of equal protection of the law or of equal privileges and immunities under the law, or for the purpose of preventing or hindering the constituted authorities of the United States or the

District of Columbia from giving or securing to all persons within the District of Columbia equal protection of the law;

(2) To injure, intimidate, or interfere with any person because of his or her exercise of any right secured by federal or District of Columbia laws, or to intimidate any person or any class of persons from exercising any right secured by federal or District of Columbia laws;

(3) To intimidate, threaten, abuse, or harass any other person; or

(4) To cause another person to fear for his or her personal safety, or where it is probable that reasonable persons will be put in fear for their personal safety by the defendant's actions, with reckless disregard for that probability.

(b) The provisions of subsection (a) of this section shall not apply to acts committed on the private property of another person, if prior to those acts:

(1) Written permission was received from the owner and occupant of the property; and

(2) The written permission was filed with the Chief of the Metropolitan Police Department.

(c) Nothing in this section shall be deemed to amend or repeal any provision of the District of Columbia Fire Prevention Code (7 DCRR). (Mar. 10, 1983, D.C. Law 4-203, § 3, 30 DCR 180.)

Section references. — This section is referred to in § 22-3112.4.

Cited in Lee v. United States, App. D.C., 668 A.2d 822 (1995).

Legislative history of Law 4-203. — See note to § 22-3112.1.

§ 22-3112.3. Wearing hoods or masks.

(a) No person or persons over 16 years of age, while wearing any mask, hood, or device whereby any portion of the face is hidden, concealed, or covered as to conceal the identity of the wearer, shall:

(1) Enter upon, be, or appear upon any lane, walk, alley, street, road highway, or other public way in the District of Columbia;

(2) Enter upon, be, or appear upon or within the public property of the District of Columbia; or

(3) Hold any manner of meeting or demonstration.

(b) The provisions of subsection (a) of this section apply only if the person was wearing the hood, mask, or other device:

(1) With the intent to deprive any person or class of persons of equal protection of the law or of equal privileges and immunities under the law, or for the purpose of preventing or hindering the constituted authorities of the United States or the District of Columbia from giving or securing for all persons within the District of Columbia equal protection of the law;

(2) With the intent, by force or threat of force, to injure, intimidate, or interfere with any person because of his or her exercise of any right secured by federal or District of Columbia laws, or to intimidate any person or any class of persons from exercising any right secured by federal or District of Columbia laws;

(3) With the intent to intimidate, threaten, abuse, or harass any other person;

(4) With the intent to cause another person to fear for his or her personal safety, or, where it is probable that reasonable persons will be put in fear for their personal safety by the defendant's actions, with reckless disregard for that probability; or

(5) While engaged in conduct prohibited by civil or criminal law, with the intent of avoiding identification. (Mar. 10, 1983, D.C. Law 4-203, § 4, 30 DCR 180.)

Section references. — This section is referred to in § 22-3112.4.

Legislative history of Law 4-203. — See note to § 22-3112.1.

§ 22-3112.4. Penalties for violation of §§ 22-3112.1 to 22-3112.3.

(a) Any person who violates any provision of § 22-3112.1 shall be fined not less than \$250 or more than \$5,000, or imprisoned for a period not to exceed 1 year, or both.

(b) Any person who violates any provision of § 22-3112.2 or 22-3112.3 shall be guilty of a misdemeanor punishable by a fine not to exceed \$500, or imprisonment not to exceed 1 year, or both. (Mar. 10, 1983, D.C. Law 4-203, § 5, 30 DCR 180.)

Legislative history of Law 4-203. — See note to § 22-3112.1.

Cited in *Craig v. United States*, App. D.C., 523 A.2d 567 (1987); *NOW v. Operation Rescue*, 726 F. Supp. 300 (D.D.C. 1989), modified, 37 F.3d 646 (D.C. Cir. 1994); *Boertje v. United*

States, App. D.C., 569 A.2d 586 (1989); *United States v. Frankel*, 739 F. Supp. 629 (D.D.C. 1990); *Simon v. United States*, App. D.C., 570 A.2d 305 (1990); *Greene v. United States*, App. D.C., 571 A.2d 218 (1990).

§ 22-3113. Destroying or defacing building material for streets.

It shall not be lawful for any person or persons to destroy, break, cut, disfigure, deface, burn, or otherwise injure any building materials, or materials intended for the improvement of any street, avenue, alley, foot pavement, roads, highways, or inclosure, whether public or private property, or remove the same (except in pursuance of law or by consent of the owner) from the place where the same may be collected for purposes of building or improvement as aforesaid; or to remove, cut, destroy, or injure any scaffolding, ladder, or other thing used in or about such building or improvement, under a penalty of not more than \$25 for each and every such offense. (July 29, 1892, 27 Stat. 322, ch. 320, § 2; 1973 Ed., § 22-3113.)

Cross references. — As to prosecutions under this section, see § 22-109.

§ 22-3114. Destroying cemetery railing or tomb.

If any person shall maliciously cut down, demolish, or otherwise injure any railing, fence, or inclosure around or upon any cemetery, or shall injure or deface any tomb or inscription thereon, such person shall be fined not more

than \$100. (Mar. 3, 1901, 31 Stat. 1327, ch. 854, § 850; 1973 Ed., § 22-3114; May 21, 1994, D.C. Law 10-119, § 2(v), 41 DCR 1639.)

Cross references. — As to prohibition of defacement of public or private building or property, see § 22-3112.1.

As to prohibition of burning of cross or other religious symbol, see § 22-3112.2.

As to prohibition of wearing of masks for specified purposes, see § 22-3112.3.

As to penalties for violation of §§ 22-3112.1 to 22-3112.3, see § 22-3112.4.

Effect of amendments. — D.C. Law 10-119 substituted “such person” for “he.”

Legislative history of Law 10-119. — See note to § 22-3109.

§§ 22-3115 to 22-3117. Offenses against property of electric lighting, heating, or power companies; tapping gas pipes; tapping or injuring water pipes; tampering with water meters.

Repealed. Dec. 1, 1982, D.C. Law 4-164, § 602(pp)-(rr), 29 DCR 3976.

Legislative history of Law 4-164. — See note to § 22-3106.

§ 22-3118. Malicious pollution of water.

Every person who maliciously commits any act by reason of which the supply of water, or any part thereof, to the City of Washington, becomes impure, filthy, or unfit for use, shall be fined not less than \$500 nor more than \$1,000, or imprisoned at hard labor not more than 3 years nor less than 1 year. (R.S., § 1806; Feb. 11, 1895, 28 Stat. 650, ch. 79; 1973 Ed., § 22-3118.)

Cross references. — As to water pollution control, see subchapter III of Chapter 9 of Title 6.

§ 22-3119. Placing obstructions on or displacement of railway tracks.

Whoever maliciously places an obstruction on or near the track of any steam or street railway, or displaces or injures anything appertaining to such track, with intent to endanger the passage of any locomotive or car, shall be imprisoned for not more than 10 years. (Mar. 3, 1901, 31 Stat. 1327, ch. 854, § 846; 1973 Ed., § 22-3119.)

§ 22-3120. Obstructing public road; removing milestones.

If any person shall alter or in any manner obstruct or encroach on a public road, or cut, destroy, deface, or remove any milestones set up on such road, or place any rubbish, dirt, logs, or make any pit or hole therein, such person may be indicted, and, upon conviction thereof before the proper court, shall be fined or imprisoned, in the discretion of the court, according to the nature of the offense. (R.S., D.C., § 268; 1973 Ed., § 22-3120.)

§ 22-3121. Obstructing public highway.

Any person who, without lawful authority, shall obstruct the free use of any of the public highways, which had been used and recognized as public county roads for 25 years prior to May 3, 1862, and which were thereafter duly surveyed, recorded, and declared public highways according to law, shall be subject to a fine for each offense of not less than \$100 nor more than \$250 and be imprisoned till the fine and the costs of suit and collection of the same are paid. (R.S., D.C., § 269; 1973 Ed., § 22-3121.)

Section references. — This section is referred to in § 22-3122.

§ 22-3122. Fines under § 22-3121 to be collected in name of United States.

The fines provided for in § 22-3121 shall be collected in the name of the United States. (R.S., D.C., §§ 1, 2, 96, 270; June 11, 1878, 20 Stat. 102, ch. 180; 1973 Ed., § 22-3122.)

CHAPTER 32. WEAPONS.

Sec.

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§ 22-3201. Definitions.

(a) "Pistol," as used in this chapter, means any firearm with a barrel less than 12 inches in length.

(b) "Sawed-off shotgun," as used in this chapter, means any shotgun with a barrel less than 20 inches in length.

(c) "Machine gun," as used in this chapter, means any firearm which shoots automatically or semiautomatically more than 12 shots without reloading.

(d) "Person," as used in this chapter, includes individual, firm, association, or corporation.

(e) "Sell" and "purchase" and the various derivatives of such words, as used in this chapter, shall be construed to include letting on hire, giving, lending, borrowing, and otherwise transferring.

(f) "Crime of violence," as used in this chapter, means any of the following crimes, or an attempt to commit any of the same, namely: murder, manslaughter, first degree sexual abuse, second degree sexual abuse, or child sexual abuse, mayhem, maliciously disfiguring another, abduction, kidnapping, burglary, robbery, housebreaking, any assault with intent to kill, commit first degree sexual abuse, second degree sexual abuse, or child sexual abuse, or robbery, assault with a dangerous weapon, assault with intent to commit any offense punishable by imprisonment in the penitentiary, arson, or extortion or blackmail accompanied by threats of violence or aggravated assault.

(g) "Dangerous crime," as used in this chapter, means distribution of or possession with intent to distribute a controlled substance, if the offense is punishable by imprisonment for more than 1 year. For the purposes of this definition, the term "controlled substance" means any substance defined as such in the District of Columbia Code or any Act of Congress.

(h) "Playground," as used in this chapter, means any facility intended for recreation, open to the public, and with any portion of the facility that contains 1 or more separate apparatus intended for the recreation of children, including, but not limited to, sliding boards, swingsets, and teeterboards.

(i) "Video arcade," as used in this chapter, means any facility legally accessible to persons under 18 years of age, intended primarily for the use of pinball and video machines for amusement, and which contains a minimum of 10 pinball or video machines.

(j) "Youth center," as used in this chapter, means any recreational facility or gymnasium (including any parking lot appurtenant thereto), intended primarily for use by persons under 18 years of age, which regularly provides athletic, civic, or cultural activities. (July 8, 1932, 47 Stat. 650, ch. 465, § 1; Dec. 27, 1967, 81 Stat. 736, Pub. L. 90-226, title V, § 501; 1973 Ed., § 22-3201; Dec. 1, 1982, D.C. Law 4-164, § 601(e), 29 DCR 3976; July 28, 1989, D.C. Law 8-19, § 3(a), 36 DCR 2844; May 8, 1990, D.C. Law 8-120, § 3(a), 37 DCR 24; Aug. 18, 1994, D.C. Law 10-150, § 3(a), 41 DCR 2594; Aug. 20, 1994, D.C. Law 10-151, § 109, 41 DCR 2608; May 23, 1995, D.C. Law 10-257, § 401(c), 42 DCR 53; _____, 1996, D.C. Law 11- (Act 11-198), § 4, 43 DCR 528.)

Cross references. — As to regulations necessary for regulation of firearms, see § 1-321.

As to firearms control, see § 6-2301 et seq.

As to minimum sentence when previously convicted of crime of violence, see § 24-203.

Section references. — This section is referred to in §§ 6-2302, 22-2404.1, 22-3204, 24-203, 24-208, 24-429.2, and 24-821.

Effect of amendments. — D.C. Law 10-150 added (h), (i) and (j).

D.C. Law 10-151 added "or aggravated assault" at the end of (f).

D.C. Law 10-257 substituted "first degree sexual abuse, second degree sexual abuse, or child sexual abuse" for "rape" twice in (f).

D.C. Law 11- (Act 11-198) validated a previously made change in (j).

Emergency act amendments. — For temporary amendment of section, see § 109 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 4-164. — Law 4-164, the "District of Columbia Theft and White Collar Crimes Act of 1982," was introduced in Council and assigned Bill No. 4-133, which was referred to the Committee on the Judiciary. The Bill was adopted on first, amended first and second readings on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.

Legislative history of Law 8-19. — Law 8-19, the "Law Enforcement Temporary Amendment Act of 1989," was introduced in Council and assigned Bill No. 8-184, which was retained by Council. The Bill was adopted on first and second readings on March 7, 1989 and April 4, 1989, respectively. Signed by the Mayor on April 17, 1989, it was assigned Act No. 8-22 and transmitted to both Houses of Congress for its review.

Legislative history of Law 8-120. — Law 8-120, the "Law Enforcement Amendment Act of 1989," was introduced in Council and assigned Bill No. 8-185, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on December 5, 1989 and December 19, 1989, respectively. Signed by the Mayor on December 21, 1989, it was assigned Act No. 8-129 and transmitted to both Houses of Congress for its review.

Legislative history of Law 10-150. — See note to § 22-3202.1.

Legislative history of Law 10-151. — Law 10-151, the "Omnibus Criminal Justice Reform Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

Legislative history of Law 10-257. — Law 10-257, the "Anti-Sexual Abuse Act of 1994," was introduced in Council and assigned Bill No. 10-87, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on November 1, 1994, and December 6, 1994, respectively. Signed by the Mayor on December 28, 1994, it was assigned Act No. 10-385 and transmitted to both Houses of Congress for its review. D.C. Law 10-257 became effective May 23, 1995.

Legislative history of Law 11- (Act 11-198) — Law 11- (Act 11-198), the "Criminal Code Technical Amendments Act of 1996," was introduced in Council and assigned Bill No. 11-484, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on December 5, 1995, and

January 4, 1996, respectively. Signed by the Mayor on January 26, 1996, it was assigned Act No. 11-198 and transmitted to both Houses of Congress for its review. D.C. Law 11- (Act 11-198) is projected to become law on May 16, 1996.

Regulatory power not foreclosed by enactment of chapter. — The enactment of this chapter in 1932 did not foreclose the further exercise of the regulatory power granted the District by § 1-321. *Maryland & D.C. Rifle & Pistol Ass'n v. Washington*, 442 F.2d 123 (D.C. Cir. 1971).

Definition of pistol. — An air pistol, even if operable, does not constitute a "pistol" for purposes of § 22-3204 and subsection (a). *Strong v. United States*, App. D.C., 581 A.2d 383 (1990).

Trial court did not commit plain error where it instructed the jury on each of the essential elements of the offense of carrying a pistol without a license, but did not provide the jury with the statutory definition of a pistol; the statutory definition of the term "pistol" is not an element of the statutory offense that the trial court was required to specifically include as part of the jury instructions. *Curington v. United States*, App. D.C., 621 A.2d 819 (1993).

Integral parts of machine gun. — As a matter of law, a magazine need not be deemed an integral part of a machine gun. Whether machine gun with a defective magazine was within the proscription of this section was a jury question. *United States v. Woodfolk*, App. D.C., 656 A.2d 1145 (1995).

Council's authority to enact emergency criminal legislation. — Because the first emergency act expired before completion of prosecution of defendant, without any authority to sustain the ongoing prosecution, the prosecution of the defendant on challenged counts of the indictment is abated. *United States v. Alston*, No. 89 Crim. 4542 (Super. Ct., February 6, 1990), appeal docketed Nos. 90-167 and 90-168 (D.C., March 30, 1990).

Continuation of emergency conditions does not justify enactment of second or successive acts. The second emergency act amending District of Columbia criminal is invalid. *United States v. Anderson*, 118 WLR 491 (Super. Ct., May 1, 1990).

Under D.C. Code, § 49-301, the general savings provision in 1 U.S.C. § 109 applies in the District of Columbia and prevents the abatement of prosecutions begun, but not completed, before the expiration of emergency criminal legislation. *United States v. Jones*, No. 89-4106 (Super. Ct., April 3, 1990).

But firearms control provisions intended to repeal police regulations. — Section 708 of the Firearms Control Regulations Act of 1975 makes explicit the District of Columbia Council's intention to repeal not Title 22 of the District of Columbia Code but those police regulations which have historically established the gun control framework for this jurisdiction. *McIntosh v. Washington*, App. D.C., 395 A.2d 744 (1978).

Weapons control law does not conflict with this chapter. — No direct and positive conflict is apparent between the Firearms Control Regulations Act of 1975 and this chapter. *McIntosh v. Washington*, App. D.C., 395 A.2d 744 (1978).

"Crime of violence" includes assault on a police officer with a dangerous weapon. — The offense of assault on a police officer with a dangerous weapon can be a predicate offense for conviction of possession of a firearm while committing a crime of violence, even though assault on a police officer with a dangerous weapon is not specifically listed as a crime of violence in subsection (f). *Parks v. United States*, App. D.C., 627 A.2d 1 (1993).

Error not to enhance sentence for crime of violence. — Trial court erred when, over objection, it refused to apply the sentence enhancement provisions of § 22-3202 to convictions for "crimes of violence," as defined in this section; a defendant subject to a mandatory minimum sentence as a result of a conviction under § 22-3204(b) may also be subject to the enhancement provisions of § 22-3202. *Hanna v. United States*, 666 A.2d 845 (D.C. App. 1995).

Cited in *United States v. Spears*, 449 F.2d 946 (D.C. Cir. 1971); *Ellis v. United States*, App. D.C., 395 A.2d 404 (1978), cert. denied, 442 U.S. 913, 99 S. Ct. 2830, 61 L. Ed. 2d 280 (1979); *Lee v. United States*, App. D.C., 402 A.2d 840 (1979); *Merriweather v. United States*, App. D.C., 466 A.2d 853 (1983); *Washington v. United States*, App. D.C., 498 A.2d 247 (1985); *Abrams v. United States*, App. D.C., 531 A.2d 964 (1987); *Townsend v. United States*, App. D.C., 559 A.2d 1319 (1989); *United States v. Alston*, App. D.C., 580 A.2d 587 (1990); *Reed v. United States*, App. D.C., 584 A.2d 585 (1990); *United States v. Alston*, 118 WLR 819 (Super. Ct. 1990); *Johnson v. United States*, App. D.C., 585 A.2d 766 (1991); *Thomas v. United States*, App. D.C., 602 A.2d 647 (1992); *Johnson v. United States*, App. D.C., 610 A.2d 729 (1992); *Dailey v. United States*, App. D.C., 611 A.2d 963 (1992); *Morris v. United States*, App. D.C., 648 A.2d 958 (1994); *Dade v. United States*, App. D.C., 663 A.2d 547 (1995).

§ 22-3202. Additional penalty for committing crime when armed.

(a) Any person who commits a crime of violence, or a dangerous crime in the District of Columbia when armed with or having readily available any pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon (including a sawed-off shotgun, shotgun, machine gun, rifle, dirk, bowie knife, butcher knife, switchblade knife, razor, blackjack, billy, or metallic or other false knuckles):

(1) May, if such person is convicted for the first time of having so committed a crime of violence, or a dangerous crime in the District of Columbia, be sentenced, in addition to the penalty provided for such crime, to a period of imprisonment which may be up to life imprisonment and shall, if convicted of such offenses while armed with any pistol or firearm, be imprisoned for a mandatory-minimum term of not less than 5 years; and

(2) Shall, if such person is convicted more than once of having so committed a crime of violence, or a dangerous crime in the District of Columbia, be sentenced, in addition to the penalty provided for such crime, to a minimum period of imprisonment of not less than 5 years and a maximum period of imprisonment which may not be less than 3 times the minimum sentence imposed and which may be up to life imprisonment and shall, if convicted of such second offense while armed with any pistol or firearm, be imprisoned for a mandatory-minimum term of not less than 10 years.

(b) Where the maximum sentence imposed under this section is life imprisonment, the minimum sentence imposed under subsection (a) of this section may not exceed 15 years imprisonment.

(c) Any person sentenced pursuant to paragraph (1) or (2) of subsection (a) above for a conviction of a crime of violence while armed with any pistol or firearm, shall serve a mandatory-minimum term of 5 years, if sentenced pursuant to paragraph (1) of subsection (a) of this section, or 10 years, if sentenced pursuant to paragraph (2) of subsection (a) of this section, and such person shall not be released on parole, granted probation, or granted suspension of sentence, prior to serving such mandatory-minimum sentence.

(d) Except as provided in subsection (c) of this section, any person sentenced under subsection (a)(2) of this section may be released on parole in accordance with Chapter 2 of Title 24, at any time after having served the minimum sentence imposed under that subsection.

(e)(1) Chapter 8 of Title 24 shall not apply with respect to any person sentenced under paragraph (2) of subsection (a) of this section.

(2) The execution or imposition of any term of imprisonment imposed under paragraph (2) of subsection (a) of this section may not be suspended and probation may not be granted.

(f) Nothing contained in this section shall be construed as reducing any sentence otherwise imposed or authorized to be imposed.

(g) No conviction with respect to which a person has been pardoned on the ground of innocence shall be taken into account in applying this section. (July 8, 1932, 47 Stat. 560, ch. 465, § 2; Dec. 27, 1967, 81 Stat. 737, Pub. L. 90-226,

title VI, § 605; July 29, 1970, 84 Stat. 600, Publ. L. 91-358, title II, § 205; 1973 Ed., § 22-3202; Mar. 9, 1983, D.C. Law 4-166, §§ 3-7, 30 DCR 1082; Dec. 7, 1985, D.C. Law 6-69, § 9, 32 DCR 4587; July 28, 1989, D.C. Law 8-19, § 3(b), 36 DCR 2844; May 8, 1990, D.C. Law 8-120, § 3(b), 37 DCR 24; May 21, 1994, D.C. Law 10-119, § 15(a), 41 DCR 1639.)

Cross references. — As to minimum sentence when person previously convicted of crime of violence, see § 24-203.

As to exceptions from application of good time credits, see § 24-434.

Section references. — This section is referred to in §§ 22-3213, 24-203, 24-267, and 24-434.

Effect of amendments. — D.C. Law 10-119 substituted "such person" for "he" in (a)(1) and (2).

Legislative history of Law 4-166. — Law 4-166, the "District of Columbia Mandatory-Minimum Sentences Initiative of 1981," was submitted to the electors of the District of Columbia on September 14, 1982, as Initiative No. 9. The results of the voting, certified by the Board of Elections and Ethics on October 12, 1982, were 84,012 for the Initiative and 32,333 against the Initiative. It was transmitted to Congress for review on October 21, 1982 and resubmitted due to the Congressional adjournment sine die on January 6, 1983. Prior to its publication in the D.C. Register on March 9, 1983, emergency legislation delayed the implementation of Law 4-166. This emergency legislation, Act 5-10, provided that the provisions of this initiative shall not be applied to any person until June 7, 1983, the expiration of the District of Columbia Mandatory-Minimum Sentences Initiative of 1981 Delayed Effectiveness Amendments Emergency Act of 1983.

Legislative history of Law 6-69. — Law 6-69, the "Youth Rehabilitation Amendment Act of 1985," was introduced in Council and assigned Bill No. 6-47, which was referred to the Committee on the Judiciary. The bill was adopted on first and second readings on June 25, 1985 and July 9, 1985, respectively. Signed by the Mayor on July 29, 1985, it was assigned Act No. 6-72 and transmitted to both Houses of Congress for its review.

Legislative history of Law 8-19. — See note to § 22-3201.

Legislative history of Law 8-120. — See note to § 22-3201.

Legislative history of Law 10-119. — Law 10-119, the "Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was

assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Purpose of Law 4-166. — Section 2 of D.C. Law 4-166 provided that the purpose of the initiative is to propose to the registered qualified electors of the District of Columbia the question of imposing mandatory-minimum sentences for those who are convicted of committing a crime of violence, as defined in Title 22, § 3201, when armed with a firearm; or for knowingly or intentionally manufacturing, distributing or possessing with intent to manufacture or distribute a controlled substance.

Section is not unconstitutional because it divests the court of discretion concerning the duration of punishment or the granting of probation. *United States v. Bridgeman*, 523 F.2d 1099 (D.C. Cir. 1975), cert. denied, 425 U.S. 961, 96 S. Ct. 1744, 48 L. Ed. 2d 206 (1976).

Legislative intent. — The legislative history of this section shows that when Congress in 1971 changed the phrase preceding the list of dangerous or deadly weapons in the introductory paragraph of subsection (a) of this section from "including but not limited to" to just "including," it intended only to avoid repetitive wording, and not to limit coverage of the section to the weapons listed. *Mitchell v. United States*, App. D.C., 399 A.2d 866 (1979).

Congress enacted this section for 2 distinct purposes: (1) To allow the court to enhance penalties of those convicted of crimes of violence while armed; and (2) to require more severe treatment of recidivists who have committed multiple crimes while armed. *McCall v. United States*, App. D.C., 449 A.2d 1095 (1982).

Purpose. — The purpose of this section is to authorize imposition of an additional penalty for committing certain underlying offenses while armed with or having readily available a dangerous weapon, as a sentencing enhancement provision, that does not comprise a criminal offense in and of itself, but is dependent upon a conviction of the underlying offense. *Thomas v. United States*, App. D.C., 602 A.2d 647 (1992).

There is nothing inherently contradictory or unreasonable in saying that Congress, in this section, gave notice that unintentional killings could receive enhanced punishment precisely because of the heightened risk of such death from playing with a loaded gun in front of others. *Morris v. United States*, App. D.C., 648 A.2d 958 (1994).

Scope. — The scope of this section is very broad; it is not confined to a prescribed list of inherently dangerous weapons or instruments commonly used as dangerous weapons, but encompasses any instrument used as a dangerous weapon, including an instrument that was merely perceived to be a dangerous weapon, and focusing on the nature of the instrument at issue. *Thomas v. United States*, App. D.C., 602 A.2d 647 (1992).

Section is applicable throughout the District. *United States v. Spears*, 449 F.2d 946 (D.C. Cir. 1971).

Expiration of Law Enforcement Emergency Amendment Act of 1989. — Because the Law Enforcement Emergency Amendment Act of 1989, which temporarily amended this section, expired prior to completion of prosecution of defendant, without any competent authority to sustain the substantive provisions or preserve ongoing prosecutions, prosecution of defendant, on challenged counts of the indictment, was abated. *United States v. Alston*, 118 WLR 819 (Super. Ct. 1990).

To prove assault on a police officer, the government must prove the elements of assault plus the additional element that the defendant knew or should have known the officer in question was a police officer. *Nelson v. United States*, App. D.C., 580 A.2d 114 (1990).

Charges arising out of riot in District Jail tried in federal court. — Armed kidnapping charges brought against a prisoner in the District Jail as a result of a riot and an attempted escape are properly tried by the federal court, as are charges of conspiracy and attempted escape from federal custody arising out of the same incident. *United States v. Bridgeman*, 523 F.2d 1099 (D.C. Cir. 1975), cert. denied, 425 U.S. 961, 96 S. Ct. 1744, 48 L. Ed. 2d 206 (1976).

Critical element of offense is dangerous or deadly weapon. — Under this section, the critical added element is that the crime is committed by one armed with a dangerous or deadly weapon, and the list of weapons merely catalogues ways in which the offense may be committed. *Meredith v. United States*, App. D.C., 343 A.2d 317 (1975).

What constitutes "dangerous weapon." — The only grammatical way to construe this section is to read it, first, as including all pistols and other firearms (or imitations thereof) within the category of dangerous or deadly weapons, and second, as identifying a dozen other objects as dangerous or deadly weapons, in addition to pistols and other firearms. *Dade v. United States*, App. D.C., 663 A.2d 547 (1995).

An instrument capable of producing death or serious bodily injury by its manner of use qualifies as a dangerous weapon whether it is used to effect an attack or is handled with

reckless disregard for the safety of others. *Powell v. United States*, App. D.C., 485 A.2d 596 (1984), cert. denied, 474 U.S. 981, 106 S. Ct. 420, 88 L. Ed. 2d 339 (1985).

A shod foot can be a dangerous weapon if it is used in such a way as to cause death or great bodily injury. *Arthur v. United States*, App. D.C., 602 A.2d 174 (1992).

The court traditionally looks to the use to which an object is put during an assault in determining whether that object was a dangerous weapon, and also the injury inflicted by an object. Evidence of serious injury resulting from an assault with a certain object is very strong evidence of the dangerous character of that object. *Arthur v. United States*, App. D.C., 602 A.2d 174 (1992).

Characteristics of dangerous instrumentalities. — A dangerous weapon need not be a hand-held item, like a pistol, dagger or hatchet, which could readily be used in combat. *Edwards v. United States*, App. D.C., 583 A.2d 661 (1990).

The specific dangerous instrumentalities enumerated in this section are all items which an assailant carries and then uses to shoot, stab, or otherwise wound his adversary; they do not include stationary objects or anything resembling them. *Edwards v. United States*, App. D.C., 583 A.2d 661 (1990).

The possession of instruments "designed" as weapons may enhance the punishment for involuntary manslaughter. *Morris v. United States*, App. D.C., 648 A.2d 958 (1994).

Pistols and other firearms. — Any pistol or other firearm is, by statutory definition, a dangerous or deadly weapon, and the jury need not find specifically that a particular pistol is a dangerous or deadly weapon in order to find the defendant guilty of an armed offense. *Dade v. United States*, App. D.C., 663 A.2d 547 (1995).

Fixed or stationary object as dangerous weapon. — Fixed or stationary plumbing fixtures against which husband hurled his wife were not dangerous weapons within the meaning of this section. *Edwards v. United States*, App. D.C., 583 A.2d 661 (1990).

Hot iron as dangerous weapon. — Victim's testimony about defendant's use of hot iron that resulted in serious burns to her chest and abdomen showed defendant had established the iron as a dangerous weapon before the rape, and the government satisfied its burden of proving the "armed" element by demonstrating that the coercive element of the sexual assault arose directly from defendant's use of a dangerous weapon: the iron. *Johnson v. United States*, App. D.C., 613 A.2d 888 (1992).

Where instrument not used or necessarily dangerous, government must show something in addition. — If an instrument found on the defendant after his arrest was not used in the crime and is not per se a dangerous

weapon, the government must show something in addition to meet the requirements of this section. *Cooper v. United States*, App. D.C., 368 A.2d 554 (1977).

Nonoperable pistol “dangerous weapon.” — A pistol, even though nonoperable, is a “dangerous weapon” within the meaning of this section. *United States v. Prater*, 462 F.2d 292 (D.C. Cir. 1972).

As is blank pistol. — Under this section, a blank pistol is a “dangerous or deadly weapon.” *Meredith v. United States*, App. D.C., 343 A.2d 317 (1975).

Testimony sufficient to find gun dangerous. — The testimony of policemen and victims that there was a gun and that a voiced threat was made to shoot a victim is sufficient to justify findings that the gun was dangerous. *United States v. Prater*, 462 F.2d 292 (D.C. Cir. 1972).

Evidence was sufficient to show that defendant had “readily available” a .38 caliber pistol within the meaning of subsection (a). *Morton v. United States*, App. D.C., 620 A.2d 1338 (1993).

Automobile may be a “dangerous or deadly weapon” within the meaning of this section. *Mitchell v. United States*, App. D.C., 399 A.2d 866 (1979).

Evidence adduced at trial permitted the jury to conclude beyond a reasonable doubt that an automobile, driven at the speeds and in the manner that defendant employed, was a dangerous weapon likely to produce death or serious bodily injury because of the wanton and reckless manner of its use in disregard of the lives and safety of others. *Powell v. United States*, App. D.C., 485 A.2d 596 (1984), cert. denied, 474 U.S. 981, 106 S. Ct. 420, 88 L. Ed. 2d 339 (1985).

Automobile as a “dangerous weapon.” — Enhancement under this section can be allowed in the case of an instrument that is not designed to be a weapon only if it can be inferred from the circumstances that the defendant was aware that his manner of use of the instrument made it an instrument likely to cause injury to others. *Reed v. United States*, App. D.C., 584 A.2d 585 (1990).

A car driven for purposes of transportation is not a weapon, but a car driven with the purpose of injuring another definitely is a weapon. *Reed v. United States*, App. D.C., 584 A.2d 585 (1990).

To allow application of this section to a charge of involuntary manslaughter causes an inherent conflict between the two convictions; and where the “weapon” involved is an automobile, the inappropriateness of enhancement of an involuntary manslaughter conviction as “while armed” is manifest. *Reed v. United States*, App. D.C., 584 A.2d 585 (1990).

An automobile is not a dangerous weapon for

the purposes of this section when operated with gross negligence as in involuntary manslaughter. *Reed v. United States*, App. D.C., 584 A.2d 585 (1990).

Unarmed aider or abettor. — An unarmed aider and abettor is subject to sentence enhancement under this section where the principal was armed. *Battle v. United States*, App. D.C., 515 A.2d 1120 (1986); *Abrams v. United States*, App. D.C., 531 A.2d 964 (1987).

Use of force allowed intervenor defending third person. — When the use of force in defense of a third person is justified, the intervenor is entitled to use the degree of force reasonably necessary to protect the other person on the basis of the facts as the intervenor, not the victim, reasonably perceives them. *Fersner v. United States*, App. D.C., 482 A.2d 387 (1984).

Assault with intent to kill while armed is a crime requiring specific intent. *United States v. Martin*, 475 F.2d 943 (D.C. Cir. 1973).

Intent of accomplice. — Accomplice did not knowingly and intentionally aid and abet in an armed robbery where principal did not decide to rob victim until after both men had arrived at the scene of the crime. *Roy v. United States*, App. D.C., 652 A.2d 1098 (1995).

Identity of perpetrator technically not element of offense. — The identity of the perpetrator of an offense, though an indispensable item of proof by the government, is not considered an “element” of the crime. *United States v. Johnson*, 589 F.2d 716 (D.C. Cir. 1978).

Government may decline to charge armed robbery under this section and may instead rely on a formulation of robbery and assault with a dangerous weapon. *Sutton v. United States*, 402 U.S. 988, 91 S. Ct. 1676, 29 L. Ed. 2d 153 (1971).

Aider and abettor principal to robbery. — An aider and abettor of an armed robbery is not guilty of a lesser included offense but is a principal to the robbery. *Atkinson v. United States*, App. D.C., 322 A.2d 587 (1974).

Lesser included offense instruction proper. — The trial judge did not err by instructing the jury, over defense objection, on kidnapping as a lesser included offense of kidnapping while armed, because the jury could rationally have had a reasonable doubt about whether appellant was armed at the time he kidnapped the complainant. *Whitaker v. United States*, App. D.C., 616 A.2d 843 (1992).

Kidnapping following robbery separate and distinct crime. — Where a helper on a truck is detained and transported against his will to a different location and the detention secures a benefit to the hijackers, 2 separate and distinct crimes are committed, i.e., kidnapping and armed robbery. *United States v. Wolford*, 444 F.2d 876 (D.C. Cir. 1971).

Kidnapping and armed robbery did not merge. — Kidnapping count did not merge with armed robbery count, despite the fact that one person was the victim of both counts, because the two crimes have different elements. *Hanna v. United States*, 666 A.2d 845 (D.C. App. 1995).

First degree burglary while armed count did not merge with kidnapping, armed robbery, or assault with dangerous weapon counts because burglary requires proof of an element (entry into a dwelling with criminal intent) that the other first incident crimes do not. Kidnapping (victim was seized or detained), armed robbery (property of value was taken), and assault with a dangerous weapon (forceful or violent attempt to inflict bodily harm) all require proof of elements that burglary does not. *Hanna v. United States*, 666 A.2d 845 (D.C. App. 1995).

Armed robbery can be committed without also violating § 22-3214, which prohibits the possession of certain weapons. *Washington v. United States*, App. D.C., 366 A.2d 457 (1976).

Distinct purposes of felony murder and armed robbery statutes. — The purpose of the armed robbery statute is to protect individuals from being unwillingly deprived of their personal property through the use of armed force, while the felony murder statute purports to protect human life. *Ellis v. United States*, App. D.C., 395 A.2d 404 (1978), cert. denied, 442 U.S. 913, 99 S. Ct. 2830, 61 L. Ed. 280 (1979).

Thus those offenses cannot merge. — There can be no merger of armed robbery and felony murder because the societal interests which Congress sought to protect by enacting this section differ from the societal interests which were meant to be protected by the enactment of § 22-2401 (felony murder). *Ellis v. United States*, App. D.C., 395 A.2d 404 (1978), cert. denied, 442 U.S. 913, 99 S. Ct. 2830, 61 L. Ed. 2d 280 (1979).

Armed robbery presupposes a crime of violence for which a dangerous or deadly weapon is available. *Rouse v. United States*, App. D.C., 402 A.2d 1218 (1979).

Assault with a dangerous weapon is lesser included offense of robbery while armed. *United States v. Johnson*, 475 F.2d 1297 (D.C. Cir. 1973).

Offense of assault with a dangerous weapon is included in armed robbery. *United States v. Thomas*, 485 F.2d 1012 (D.C. Cir. 1973).

Assault with a dangerous weapon is a lesser included offense of armed robbery. *United States v. McKinley*, 485 F.2d 1059 (D.C. Cir. 1973).

Assault with a dangerous weapon is a lesser included offense of armed robbery of the same person. *United States v. Lee*, 509 F.2d 400 (D.C.

Cir. 1974), cert. denied, 420 U.S. 1006, 95 S. Ct. 1451, 43 L. Ed. 2d 765 (1975).

Counts of assault with a dangerous weapon are lesser included offenses of assault with attempt to commit robbery and armed robbery. *Quick v. United States*, App. D.C., 316 A.2d 875 (1974).

Assault with a dangerous weapon is a lesser included offense of robbery while armed and the 2 offenses merge when they both arise out of the same act of the defendant. *Leftwich v. United States*, App. D.C., 460 A.2d 993 (1983).

Assault with a dangerous weapon is a lesser included offense of armed robbery because all of the elements of assault with a dangerous weapon are included in armed robbery. *Norris v. United States*, App. D.C., 585 A.2d 1372 (1991).

Assault with a dangerous weapon is a lesser included offense of armed robbery and when the former is committed in order to effect the latter, the conviction for assault with a dangerous weapon merges into the conviction for armed robbery. *Norris v. United States*, App. D.C., 585 A.2d 1372 (1991).

And offenses merge. — Where armed robberies and assaults with a dangerous weapon are committed against the same persons, the latter offenses merge into the former. *United States v. Holiday*, 482 F.2d 729 (D.C. Cir. 1973).

A count charging assault with a dangerous weapon is merged with a count charging armed robbery. *Smith v. United States*, App. D.C., 312 A.2d 781 (1973).

Blow to victim's head was done to effectuate the in-progress armed robbery, not under a "fresh impulse"; convictions for assault with dangerous weapon and armed robbery merged. *Simms v. United States*, App. D.C., 634 A.2d 442 (1993).

And offenses do not merge. — Where assault with a dangerous weapon and armed robbery are triggered by separate acts, merger is precluded but in order to separate the charges, the defendant must have completed one crime and have begun another. *Norris v. United States*, App. D.C., 585 A.2d 1372 (1991).

This section and § 22-3204(b) do not merge. — When the Council created § 22-3204(b) and amended this section, it did not intend for the offense proscribed by § 22-3204(b) to merge with an offense subject to the enhanced penalty provision of this section. *Thomas v. United States*, App. D.C., 602 A.2d 647 (1992).

Under certain circumstances the effect of merging this section and § 22-3204(b) would be a reduction in the sentence authorized to be imposed, and there is no indication whatsoever that the legislature intended such a result when it enacted § 22-3204(b) and amended this section, leading to the conclusion the legislature did not intend for the convictions to

merge. *Thomas v. United States*, App. D.C., 602 A.2d 647 (1992).

Possession of firearm during commission of crime does not merge with assault with intent to kill while armed. — Conviction under § 22-3204(b) for possession of a firearm during a crime of violence does not merge into a conviction under § 22-501 and this section, for assault with intent to kill while armed. *Little v. United States*, App. D.C., 613 A.2d 880 (1992).

Robbery and assault with dangerous weapon are lesser included offenses of armed robbery. *Franey v. United States*, App. D.C., 382 A.2d 1019 (1978).

Robbery is a lesser included offense of armed robbery. *Anderson v. United States*, App. D.C., 490 A.2d 1127 (1985).

And convictions for both offenses cannot stand together. — The jury could not convict defendant of both assault with intent to kill while armed and of the lesser included offense of assault with a dangerous weapon when the 2 offenses arise out of the same act. *Leftwitch v. United States*, App. D.C., 460 A.2d 993 (1983).

Multiple convictions on alternate theories prohibited. — Where one killing is involved, and the government advances alternate theories of felony murder based upon more than one underlying felony, the accused may not be convicted of more than one felony murder. *Mitchell v. United States*, App. D.C., 629 A.2d 10 (1993), cert. denied, — U.S. —, 114 S. Ct. 1119, 127 L. Ed. 2d 429 (1994).

In light of defendant's conviction for first degree murder, his felony murder conviction was vacated. *Mitchell v. United States*, App. D.C., 629 A.2d 10 (1993), cert. denied, — U.S. —, 114 S. Ct. 1119, 127 L. Ed. 2d 429 (1994).

Assault with a dangerous weapon was a lesser included offense of mayhem while armed. *Wynn v. United States*, App. D.C., 538 A.2d 1139 (1988).

Assault with a dangerous weapon as lesser included offense of armed assault with intent to kill and armed mayhem. — Assault with a dangerous weapon could be considered as a lesser included offense for both armed assault with intent to kill and armed mayhem, where there was evidence in the record that would support assault with a dangerous weapon as a lesser included offense of armed mayhem. *Hayward v. United States*, App. D.C., 612 A.2d 224 (1992).

Murder while armed merges with armed robbery. — Convictions for second degree murder while armed and armed robbery were vacated, as they had merged with the conviction for felony murder while armed. *Gresham v. United States*, App. D.C., 654 A.2d 871, cert. denied, — U.S. —, 116 S. Ct. 155, 133 L. Ed. 2d 99 (1995).

First degree burglary is lesser included offense of first degree burglary while armed. *Franey v. United States*, App. D.C., 382 A.2d 1019 (1978).

Assault with dangerous weapon merges with offense of assault with intent to kill while armed. *Leftwitch v. United States*, App. D.C., 460 A.2d 993 (1983).

Armed robbery does not merge into possession of dangerous weapons. — *Jones v. United States*, App. D.C., 516 A.2d 929 (1986), cert. denied, 481 U.S. 1054, 107 S. Ct. 2193, 95 L. Ed. 2d 848 (1987).

First degree burglary while armed count did not merge with carrying a pistol without a license count. First degree burglary while armed (§§ 22-1801, 22-3202) requires proof that the defendant entered a dwelling of another person — when a person was present in the dwelling — while armed or having readily available a firearm or any other dangerous weapon, but the weapon need not be an operable and unlicensed pistol. *Hanna v. United States*, 666 A.2d 845 (D.C. App. 1995).

Armed robbery and assault with a dangerous weapon merge where both offenses are committed against the same victim as part of the same criminal incident. *Morris v. United States*, App. D.C., 622 A.2d 1116, cert. denied, — U.S. —, 114 S. Ct. 270, 126 L. Ed. 2d 221 (1993).

Retrial of armed burglary can include lesser charge of burglary. — Where the evidentiary failure relating to a charge of burglary while armed concerns only the circumstance of being armed, a retrial can include the lesser charge of burglary. *United States v. Carter*, 522 F.2d 666 (D.C. Cir. 1975).

Assault with dangerous weapon and armed rape merge. — Assault with a dangerous weapon conviction merged with conviction for armed rape. *Johnson v. United States*, App. D.C., 613 A.2d 888 (1992).

Assault with dangerous weapon merges with armed rape assault. — Where charges of assault with intent to commit rape while armed and charges of assault with a dangerous weapon arise from the same act or transaction, the latter charge, merges with and became a lesser offense to the former charge. *United States v. Benn*, 476 F.2d 1127 (D.C. Cir. 1972).

And armed assault lesser included offense within armed rape. — Where an armed assault is an essential part of the proof establishing an armed rape, the armed assault is a lesser offense included within the armed rape. *United States v. Edmonds*, 524 F.2d 62 (D.C. Cir. 1975).

Once intoxication defense interposed in assault prosecution, prosecution must establish specific intent. — Once a defense of intoxication is interposed in a prosecution for assault with intent to kill while armed, the

burden rests with the prosecution to establish that at the time the offense was committed the defendant had the capacity to form the requisite specific intent. *United States v. Martin*, 475 F.2d 943 (D.C. Cir. 1973).

Whether the defendant acted in self-defense is a question for the jury. *United States v. McCrae*, 459 F.2d 1140 (D.C. Cir. 1972).

Defendant may raise an insanity defense in a prosecution for armed robbery, assault with a deadly weapon and carrying a pistol without a license. *United States v. Simms*, 463 F.2d 1273 (D.C. Cir. 1972).

Criminal acts tied to mental impairment require exculpation. — Criminal acts committed by the defendant may be so proximately tied to mental impairment as to require exculpation. *United States v. Wilson*, 471 F.2d 1072 (D.C. Cir. 1972), cert. denied, 410 U.S. 957, 93 S. Ct. 1431, 35 L. Ed. 2d 691 (1973).

And where conviction reversed, conviction of codefendant with similar defense also nullified. — Where the prosecutor's improper closing and rebuttal arguments are so highly prejudicial as to require a reversal of the conviction of a defendant who relied upon insanity as a defense, the conviction of a codefendant who asserted lack of intent will also be nullified. *United States v. Hawkins*, 480 F.2d 1151 (D.C. Cir. 1973).

Prearrest delay must not be deliberate. — A delay in arresting the defendant must not be the product of any deliberate effort by the police to gain an advantage. *United States v. Parish*, 468 F.2d 1129 (D.C. Cir. 1972), cert. denied, 410 U.S. 957, 93 S. Ct. 1430, 35 L. Ed. 2d 690 (1973).

Speedy trial right not impinged where defendant at large and suffers no prejudice. — The right to a speedy trial is not impinged by a delay where the defendant is still at large, the police are doing their best to locate him, the defendant does not press a speedy trial right, and where the defendant suffers no prejudice to his defense. *United States v. Parish*, 468 F.2d 1129 (D.C. Cir. 1972), cert. denied, 410 U.S. 957, 93 S. Ct. 1430, 35 L. Ed. 2d 690 (1973).

Statement after on-the-scene confrontation may not undermine trial's fairness, considering evidence as whole. — In a prosecution for armed robbery and assault with a dangerous weapon, even if the defendant's statement made after he was arrested and brought back to the scene is somehow attributable to the hostile confrontation of the victims, it may not undermine the fairness of the trial, considering the evidence as a whole. *United States v. Porcha*, 450 F.2d 697 (D.C. Cir. 1971).

Government must establish waiver of legal assistance after arrest. — In an armed robbery prosecution, the government must sus-

tain its burden of establishing a knowing waiver by the defendant of his right to independent legal assistance after his arrest. *United States v. Frazier*, 476 F.2d 891 (D.C. Cir. 1973).

Corroboration of admissions. — Where the government introduced undisputed evidence that an armed robbery had occurred, with several details matching those of the defendant's admissions, there was adequate corroborative evidence supporting the trustworthiness of those admissions. *United States v. Johnson*, 589 F.2d 716 (D.C. Cir. 1978).

Defendant's corroborated admissions to police officer could be used to corroborate other admissions. *United States v. Johnson*, 589 F.2d 716 (D.C. Cir. 1978).

Confession sufficient link between accused and crime. — In cases such as armed robbery where the fact that a crime has been committed can be shown without identifying the perpetrator, there need be no link, outside the confession, between the crime and the accused who admits having committed it. *United States v. Johnson*, 589 F.2d 716 (D.C. Cir. 1978).

On-the-scene identification following description and participation in search constitutional. — The identification of a defendant who is charged with armed robbery and assault with a deadly weapon by the victim near the scene of the crime does not violate the defendant's due process rights where the victim gave a detailed description of the robber, participated in the search, and pointed him out. *United States v. Wilson*, 449 F.2d 1005 (D.C. Cir. 1971).

But confrontation must not be unduly suggestive. — In a prosecution for attempted robbery while armed, an on-the-scene confrontation must not be so unduly suggestive as to create a substantial likelihood of misidentification. *Bowler v. United States*, App. D.C., 322 A.2d 281 (1974).

Court order not required before arrested defendant viewed at lineup. — Where the defendant has been lawfully arrested for assault with intent to commit robbery while armed and is in custody or on bond, no court order is required before he can be viewed at a lineup by the victims of the prior robbery, as long as the presentment before the magistrate is without undue delay and the presence of counsel at the lineup is assured. *United States v. Anderson*, 352 F. Supp. 33 (D.D.C. 1972), aff'd, 490 F.2d 785 (D.C. Cir. 1974).

Identification supporting conviction. — Where a witness sees the defendant twice before he identifies him to a police officer and where he identifies him from a group of people on the street only days after his attack, goes immediately to the police and is "100% positive" of his identification, this is significant enough an identification to support a conviction under

this section. *Fitzhugh v. United States*, App. D.C., 415 A.2d 548 (1980).

Evidence may be sufficient for conviction notwithstanding "inconclusive" identification. — Evidence may be sufficient to support a conviction of armed robbery, assault with a dangerous weapon and possession of unregistered firearm notwithstanding that the identification of the defendant is "inconclusive" at best. *United States v. McCall*, 460 F.2d 952 (D.C. Cir. 1972).

Requirement that prosecutor disclose before trial material evidence favorable to accused is satisfied when defendant is furnished a copy of exculpatory statement and the address and telephone number of the declarant. The government need not obtain and maintain the availability of an exculpatory declarant as well. *Jackson v. United States*, App. D.C., 424 A.2d 40 (1980), cert. denied, 454 U.S. 1127, 102 S. Ct. 979, 71 L. Ed. 2d 116 (1981).

Words "said defendant being then and there armed" are mere surplusage to indictment for robbery and do not charge a separate offense for the purpose of increasing the punishment. *Tomlinson v. United States*, 93 F.2d 652 (D.C. Cir. 1937), cert. denied, 303 U.S. 646, 58 S. Ct. 645, 82 L. Ed. 1107 (1938).

Where clear evidence of armed robbery, charging both robbery and armed robbery harmless. — In view of clear evidence that the defendant aided and abetted his confederate who was armed with a gun, any error concerned with the alleged prolixity of the indictment that charged both armed robbery and robbery, or any other claim of defect in the presentation of 2 theories of robbery to the jury, is harmless. *United States v. Porcha*, 450 F.2d 697 (D.C. Cir. 1971).

Indictment charging violation of § 22-2901 and this section held sufficient. — A 1-count indictment purporting to charge armed robbery in violation of § 22-2901 and this section sufficiently apprised the defendant of the charge against him despite its failure to employ the statutory language regarding "force or violence" or "putting in fear." *United States v. Bradford*, App. D.C., 482 A.2d 430 (1984).

Where circumstances surrounding criminal episodes remarkably similar, no prejudice in joinder. — Where the similarity of circumstances surrounding 2 criminal episodes on which charges of rape while armed and armed robbery are based are sufficiently remarkable to prove that there is a reasonable probability that the same person committed the crimes, there is no prejudice in the joinder of both crimes. *United States v. Adams*, 481 F.2d 1099 (D.C. Cir. 1973).

Where defendant was charged with assault, murder, rape, sodomy, robbery, and a crime with a weapon, the allegations were separate and distinct, there was little likelihood of the

charges being confused or treated as one event, and joinder of the counts therefore did not work undue prejudice against defendant. *Bowyer v. United States*, App. D.C., 422 A.2d 973 (1980).

Arnold decision prohibiting certain separate convictions is retroactive. — The constitutional interpretation by the Court of Appeals in *Arnold v. United States*, 467 A.2d 136 (1983), that the Double Jeopardy Clause of the Fifth Amendment prohibits separate convictions for grand larceny and unauthorized use of a vehicle arising out of the same transaction, is fully retroactive. *Kirk v. United States*, App. D.C., 510 A.2d 499 (1986).

Rejection by the Court of Appeals of a Fifth Amendment merger of offenses claim on direct appeal in an unpublished memorandum order issued prior to *Arnold v. United States*, 467 A.2d 136 (1983), does not preclude raising the issue again by way of a § 23-110 motion to vacate or correct sentence. *Kirk v. United States*, App. D.C., 510 A.2d 499 (1986).

Failure to sever armed robbery and obstruction of justice counts held proper. — See *Byrd v. United States*, App. D.C., 502 A.2d 451 (1985).

Court may deny severance from codefendant who stabbed victim. — In a prosecution on murder and rape charges, the court does not abuse its discretion in denying a severance from a codefendant who fatally stabbed the victim. *United States v. Heinlein*, 490 F.2d 725 (D.C. Cir. 1973).

No absolute right to plea bargain. — As respects a defendant charged with armed robbery and carrying a dangerous weapon, there is no absolute right to plea bargain. *Smith v. United States*, App. D.C., 356 A.2d 650 (1976).

Relevant evidence. — Evidence relating to a store which the defendant and others were intending to rob at the time the defendant saw, shot, and killed the deceased is relevant to explain the immediate setting of the murder, and the probative value of this evidence outweighs any prejudicial effect. *Tabron v. United States*, App. D.C., 410 A.2d 209 (1979).

Admissible evidence. — In a prosecution for armed robbery, a sawed-off shotgun seized at the time of the arrest is admissible where there is evidence as to its resemblance to the gun used at the scene of the offense. *United States v. McKinley*, 485 F.2d 1059 (D.C. Cir. 1973).

In a prosecution on several counts arising from a robbery, the admission in evidence of a pistol is proper where a government witness testifies that the pistol belonged to one of the defendants and was carried by him during the robbery. *United States v. Knight*, 509 F.2d 354 (D.C. Cir. 1974).

In a homicide trial where the accused raises a claim of self-defense, the government may properly introduce evidence of the prior rela-

tionship between the defendant and the victim to show who was the initial aggressor and whether the defendant was in reasonable fear of imminent great bodily harm. *Rawls v. United States*, App. D.C., 539 A.2d 1087 (1988).

Possession charge not barred by double jeopardy. — Where the trial judge found that the defendant took possession of a shotgun on 2 separate occasions, the decision to charge him with possession of a prohibited weapon with regard to the first occasion was not barred by double jeopardy as a result of his guilty plea in connection with the second occasion. *Wilson v. United States*, App. D.C., 590 A.2d 1002, cert. denied, 501 U.S. 1257, 111 S. Ct. 2906, 115 L. Ed. 2d 1069 (1991).

Determination as to whether possession continuous or interrupted. — In cases where possession at any time is prohibited, the court must still consider whether possession was continuous, in which event only 1 offense is properly charged, or whether possession was interrupted and resumed, in which event each resumption of possession would signal the start of a new possessory offense. *Wilson v. United States*, App. D.C., 590 A.2d 1002, cert. denied, 501 U.S. 1257, 111 S. Ct. 2906, 115 L. Ed. 2d 1069 (1991).

Foreseeability that weapon would be required. — The natural and probable consequence of the alleged accomplice's actions will not lead to complicity with an armed offense, unless the accused could reasonably foresee a weapon would be required. *Ingram v. United States*, App. D.C., 592 A.2d 992, cert. denied, 502 U.S. 1017, 112 S. Ct. 667, 116 L. Ed. 2d 757 (1991).

In order to receive the enhanced penalties applicable to a robbery when armed, the defendant is entitled to a reasonably foreseeable weapon instruction. *Ingram v. United States*, App. D.C., 592 A.2d 992, cert. denied, 502 U.S. 1017, 112 S. Ct. 667, 116 L. Ed. 2d 757 (1991).

When robbery is not per se consequence. — Robbery of any buyer or seller in a drug or unlicensed pistol sale is not per se the "natural and probable consequence" of that transaction. *Roy v. United States*, App. D.C., 652 A.2d 1098 (1995).

Inadmissible evidence. — Evidence that the defendant's sole defense witness has been charged with obstruction of justice for her alleged efforts to persuade the complaining witness not to identify the codefendant should not be admitted over objection, in a prosecution for assault and armed robbery, to impeach, where the testimony of the complaining witness reveals the facts which are the basis for the charge. *United States v. Maynard*, 476 F.2d 1170 (D.C. Cir. 1973).

Conflicting testimony does not destroy inference of guilt. — The conflicting testimony of the defendant and his codefendants,

whereby they all seek to establish that the defendant and one of his codefendants were innocent bystanders, does not destroy the permissible inference of the defendant's guilt arising from the other evidence. *United States v. Lumpkin*, 448 F.2d 1085 (D.C. Cir. 1971).

Competency of prosecutrix committed to court's discretion. — The competency of a mentally retarded prosecutrix to testify in a prosecution for assault with intent to commit rape while armed, assault with a dangerous weapon, and carrying a dangerous weapon is a threshold question of law committed to the court's discretion. *United States v. Benn*, 476 F.2d 1127 (D.C. Cir. 1972).

Ruling on cross-examination of character witnesses without knowledge of their testimony error. — Where, at the time the judge rules during a trial for armed robbery and related offenses, that if the defense puts on good character witnesses then the prosecution could cross-examine such witnesses to determine if they were aware of the defendant's prior arrests, he does not know whether they would speak to reputation for peace and good order or as to reputation for truth and veracity, and the ruling is error. *United States v. Lewis*, 482 F.2d 632 (D.C. Cir. 1973).

Where overwhelming direct evidence, any claimed error harmless. — In a prosecution for assault with intent to kill while armed and carrying a dangerous weapon, in view of overwhelming direct evidence timely placing the defendant at the scene of the crime and the equivocal and unsupported nature of his own testimony concerning his whereabouts at the time of the offense, any emphasis by the court or his counsel on his more general defenses and any other claimed error is harmless beyond a reasonable doubt. *United States v. Craven*, 458 F.2d 802 (D.C. Cir. 1972).

Conviction reversed where impact of damaging hearsay uncertain. — Defendant's conviction of second degree murder while armed was reversed where it could not be said with sufficient certainty that the evidence which was properly admitted was so overwhelming that he was not impermissibly prejudiced by a highly damaging hearsay statement as to his holding a gun to the decedent's head. *Campbell v. United States*, App. D.C., 391 A.2d 283 (1978).

And where decedent's statements admitted, although state of mind not at issue. — Statements of the decedent admitted under the state-of-mind exception to the hearsay rule are prejudicial and require a reversal of a conviction under this section where declarant's state of mind is never in issue at trial. *Clark v. United States*, App. D.C., 412 A.2d 21 (1980).

Instruction regarding definition of dangerous or deadly weapon. — The definition of a dangerous or deadly weapon must be

included in the instruction only when the object or instrument alleged to be a weapon is not one of the weapons specifically listed in this section, the "while armed" statute. *Dade v. United States*, App. D.C., 663 A.2d 547 (1995).

Instruction on specific intent should not be omitted in a prosecution for armed robbery, assault with a dangerous weapon and carrying a dangerous weapon. *United States v. Gaither*, 440 F.2d 262 (D.C. Cir. 1971).

"Model instruction" on mistaken identity is adequate. *United States v. Thomas*, 485 F.2d 1012 (D.C. Cir. 1973).

Jury may consider lying witness' motivation. — In a trial of a defendant charged with armed robbery, the jury may take into consideration the reasons for a witness having previously lied. *Smith v. United States*, App. D.C., 312 A.2d 781 (1973).

Defendant not always entitled to instruction on lesser included offenses. — Where the defendant's evidence in a prosecution for felony murder and armed robbery was so incredible that it provided no rational basis for a lesser charge of assault with a deadly weapon or simple assault, the trial court was not required to instruct the jury on those lesser included offenses. *Day v. United States*, App. D.C., 390 A.2d 957 (1978), rev'd on other grounds sub nom. *Graves v. United States*, App. D.C., 490 A.2d 1086 (1984).

Court may give supplemental instruction on aiding and abetting. — Where the jury has commenced its deliberations in a prosecution for armed robbery, assault with a dangerous weapon, receiving stolen property, and carrying a pistol without a license, the court does not abuse its discretion by giving a supplemental instruction on aiding and abetting. *Atkinson v. United States*, App. D.C., 322 A.2d 587 (1974).

Trial court did not plainly err in its treatment of unanimous verdict requirement when it instructed the jury that it could convict of armed robbery if it found that defendant was armed or had readily available a pistol and/or a knife. *Gordon v. United States*, App. D.C., 466 A.2d 1226 (1983).

Where possibility of diverting deliberations from neutral atmosphere, retrial required. — Where events create a substantial possibility of diverting the jury deliberations from an essential neutral and nondistracting atmosphere, a retrial is required as a matter of law. *Morton v. United States*, App. D.C., 415 A.2d 800 (1980).

Evidence sufficient to sustain conviction. — The complaining witness' testimony that he was robbed at gunpoint is sufficient to sustain a conviction for armed robbery, even though the weapon used is not put in evidence. *United States v. Stevenson*, 443 F.2d 661 (D.C. Cir. 1970); *Jones v. United States*, App. D.C.,

566 A.2d 44 (1989); *Martinez v. United States*, App. D.C., 566 A.2d 1049 (1989), cert. denied, 498 U.S. 1030, 111 S. Ct. 685, 112 L. Ed. 2d 677 (1991); *Luchie v. United States*, App. D.C., 610 A.2d 248 (1992).

Evidence that the defendant was found within an hour of a larceny in the exclusive possession of recently stolen goods, supports convictions of armed robbery and assault with a dangerous weapon. *United States v. Wolford*, 444 F.2d 876 (D.C. Cir. 1971).

The testimony of an eyewitness is sufficient to support a guilty verdict of felony murder and assault with intent to commit rape while armed. *United States v. Heinlein*, 490 F.2d 725 (D.C. Cir. 1973).

Evidence was sufficient to support conviction for second degree murder while armed. *Gayden v. United States*, App. D.C., 584 A.2d 578 (1990), cert. denied, 502 U.S. 843, 112 S. Ct. 137, 116 L. Ed. 2d 104 (1991).

Evidence was sufficient to prove that defendant used a real or imitation pistol during robbery. *Bates v. United States*, App. D.C., 619 A.2d 984 (1993).

Evidence sufficient to sustain convictions for possession of a prohibited weapon, felony murder and burglary. *Marshall v. United States*, App. D.C., 623 A.2d 551 (1992).

Evidence sufficient. — *Franey v. United States*, App. D.C., 382 A.2d 1019 (1978); *Branch v. United States*, App. D.C., 382 A.2d 1033 (1978); *Stewart v. United States*, App. D.C., 383 A.2d 330 (1978); *Allen v. United States*, App. D.C., 383 A.2d 363 (1978); *Jones v. United States*, App. D.C., 386 A.2d 308 (1978), cert. denied, 444 U.S. 925, 100 S. Ct. 263, 62 L. Ed. 2d 181 (1979); *Christian v. United States*, App. D.C., 394 A.2d 1 (1978), cert. denied, 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315 (1979); *Jackson v. United States*, App. D.C., 395 A.2d 99 (1978); *Ellis v. United States*, App. D.C., 395 A.2d 404 (1978), cert. denied, 442 U.S. 913, 99 S. Ct. 2830, 61 L. Ed. 2d 280 (1979); *Glass v. United States*, App. D.C., 395 A.2d 796 (1978); *United States v. Johnson*, 589 F.2d 716 (D.C. Cir. 1978); *Cunningham v. United States*, App. D.C., 408 A.2d 1240 (1979); *Fox v. United States*, App. D.C., 421 A.2d 9 (1980); *Downing v. United States*, App. D.C., 434 A.2d 409 (1981); *Boyd v. United States*, App. D.C., 473 A.2d 828 (1984); *Fields v. United States*, App. D.C., 484 A.2d 570 (1984), cert. denied, 471 U.S. 1067, 105 S. Ct. 2144, 85 L. Ed. 2d 501 (1985); *Owens v. United States*, App. D.C., 497 A.2d 1086 (1985), cert. denied, 474 U.S. 1085, 106 S. Ct. 861, 88 L. Ed. 2d 900 (1986); *Hairston v. United States*, App. D.C., 497 A.2d 1097 (1985).

Evidence introduced at trial tracing spent bullets found a few feet from the victim's head as coming from a "revolver" was sufficient evidence that weapon was used in homicide even though the weapon was never recovered by

police. *Gates v. United States*, App. D.C., 481 A.2d 120 (1984), cert. denied, 470 U.S. 1058, 105 S. Ct. 1772, 84 L. Ed. 2d 832 (1985); *Hordge v. United States*, App. D.C., 545 A.2d 1249 (1988).

There was sufficient evidence of mayhem while armed. *Whitaker v. United States*, App. D.C., 616 A.2d 843 (1992).

Evidence insufficient to sustain conviction. — Evidence that the victim was confronted by men who held a gun on him and went through his pockets and that he told the policemen that he had been robbed is insufficient to support an armed robbery conviction. *United States v. McGill*, 487 F.2d 1208 (D.C. Cir. 1973).

Evidence was insufficient to support the jury's finding that defendant inflicted his wife's injuries while armed, within the meaning of this section, when his alleged weapon consisted of one or more fixed or stationary plumbing fixtures against which he hurled his wife. *Edwards v. United States*, App. D.C., 583 A.2d 661 (1990).

Evidence sufficient to establish specific intent. — Evidence was sufficient to establish beyond a reasonable doubt that the defendant had the specific intent to kill the children when he fired into the room where they were at such range which was bound to place in peril the lives of his young potential victims. *Gray v. United States*, App. D.C., 585 A.2d 164 (1991).

Conviction of possession of prohibited weapon does not merge into armed robbery conviction. *Woody v. United States*, App. D.C., 369 A.2d 592 (1977).

But jury convicts for assault with dangerous weapon only on finding separate beating. — The jury can convict on an assault with a dangerous weapon charge in an armed robbery prosecution only if it finds that, separate and apart from pointing the gun at the complaining witness, the complaining witness was beaten with the gun. *Dixon v. United States*, App. D.C., 320 A.2d 318 (1974).

Or where assault occurred after robbery. — A conviction of assault with a deadly weapon will not be set aside as a lesser included offense of armed robbery, where the assault occurred after the conclusion of all earlier crimes, including the armed robbery. *Davis v. United States*, App. D.C., 367 A.2d 1254 (1976), cert. denied, 434 U.S. 847, 98 S. Ct. 154, 54 L. Ed. 2d 114 (1977).

Armed robbery conviction not vitiated by felony murder. — There is nothing in either the armed robbery or the felony murder statute to indicate that Congress intended to vitiate conviction for the underlying crime whenever death resulted during its commission. *Ellis v. United States*, App. D.C., 395 A.2d 404 (1978), cert. denied, 442 U.S. 913, 99 S. Ct. 2830, 61 L. Ed. 2d 280 (1979).

Merger of counts. — Where defendant was charged with three counts of assault with intent to kill while armed, the counts need not be merged if a reasonable jury could conclude that one shot was fired at each child. *Gray v. United States*, App. D.C., 585 A.2d 164 (1991).

Assault with dangerous weapon conviction merged with assault to commit robbery while armed. — Conviction for assault with a dangerous weapon was vacated by the trial judge as having merged with the count of assault with intent to commit robbery while armed. *Forbes v. United States*, App. D.C., 390 A.2d 453 (1978).

And with armed robbery conviction. — Convictions of assault with a dangerous weapon merge with armed robbery convictions connected with the same robbery. *United States v. Toy*, 482 F.2d 741 (D.C. Cir. 1973).

It is improper to convict both for assault with a dangerous weapon and armed robbery where the assault is a necessary part of the evidence needed to support the count of armed robbery. *Taylor v. United States*, App. D.C., 324 A.2d 683 (1974).

Underlying felony merges into felony murder conviction so that convictions for the felonies of rape, robbery, and burglary, which underlay a felony murder conviction, should be vacated. *Leasure v. United States*, App. D.C., 458 A.2d 726 (1983).

Sentencing defendant for 2 felony murders based upon the offenses of sodomy and armed robbery involving a single homicide was error. *Adams v. United States*, App. D.C., 502 A.2d 1011 (1986).

Convictions under both federal mail robbery provisions and local provisions cannot be supported. — The part of the federal mail robbery statute prohibiting assault was intended by Congress to prohibit certain kinds of attempts to rob and cannot support an independent conviction when a defendant is charged with and convicted of committing the same crime he is charged with attempting. *United States v. Spears*, 449 F.2d 946 (D.C. Cir. 1971).

The conviction of defendants for both armed robbery and federal mail robbery arising from a single transaction is improper. *United States v. Knight*, 509 F.2d 354 (D.C. Cir. 1974).

Acquittal of armed robbery not necessary acquittal of unarmed robbery. — Where the jury returns a verdict of not guilty of armed robbery but is unable to agree as to whether the defendant was an unarmed robber, the acquittal of armed robbery is not an acquittal of unarmed robbery. *United States v. Scott*, 464 F.2d 832 (D.C. Cir. 1972).

Life sentence or mandatory-minimum sentence. — To be eligible for a life sentence under subsection (a)(1) of this section, a single perpetrator need not have been "armed" but

may also be included if he or she merely had a firearm "readily available." In contrast, to receive the mandatory-minimum sentence, a single perpetrator must actually have been "armed"; it is not enough for this purpose that the defendant had a gun "readily available." *Abrams v. United States*, App. D.C., 531 A.2d 964 (1987).

Proof that first conviction involved pistol or firearm not required. — The use of the word "such" in the last sentence of subsection (a)(2) was designed to refer to predicate crimes of violence committed with any subsection (a) weapon, and the 10-year mandatory minimum therefore applies whenever the second crime of violence was committed with a pistol or firearm even though there was no indication that the first conviction involved a pistol or firearm. *Lemon v. United States*, App. D.C., 564 A.2d 1368 (1989).

Sentencing under subsection (a)(2) of defendant convicted under § 22-502. — A defendant convicted of assault with a deadly weapon, § 22-502, who has previously been convicted of a crime of violence, may be sentenced under subsection (a)(2) of this section even though subsection (a)(1) of this section may not be applied to assault with a deadly weapon. *McCall v. United States*, App. D.C., 449 A.2d 1095 (1982).

Concurrent sentences for armed robbery and felony murder held illegal. — Since a conviction for killing in the course of an armed robbery cannot be had without proving all the elements of the offense of armed robbery, imposition of concurrent sentences of 20 years to life on each separate count of felony murder and armed robbery is illegal as effectively resulting in multiple or cumulative punishment and must be vacated. *Tribble v. United States*, App. D.C., 447 A.2d 766 (1982).

Consecutive sentences for armed robbery and assault with intent to kill. — Where, during the course of a robbery, defendant shot one of his robbery victims, and was convicted of both the armed robbery of his victim under § 22-2901 and this section and assault with intent to kill while armed under § 22-501 and this section, separate, consecutive sentences for the 2 convictions were not precluded by the merger doctrine. *Taylor v. United States*, App. D.C., 508 A.2d 99 (1986).

Consecutive sentences may be inappropriate means to bring about additional punishment. — If additional punishment is to be meted out in an armed robbery prosecution for the use of a dangerous weapon, consecutive sentences for robbery and assault with a dangerous weapon may be an inappropriate means to accomplish that result, as a more impregnable sentence may result if the offense is charged and sentenced under § 22-3201 and this section. *Sutton v. United States*, 434 F.2d 462

(D.C. Cir. 1970), cert. denied, 402 U.S. 988, 91 S. Ct. 1676, 29 L. Ed. 2d 153 (1971).

Sentencing judge determines penalty in combined prosecution for local and federal robberies. — When Congress in 1967 amended this section, providing a higher penalty for robberies in the District than had been provided since 1948 for federal mail robbery, it intended to provide the sentencing judge with discretion in determining the penalty in a combined prosecution for both offenses. *United States v. Knight*, 509 F.2d 354 (D.C. Cir. 1974).

Dual sentences under federal and District statutes impermissible. — Dual sentencing for armed bank robbery under the United States Code and armed robbery under the District of Columbia Code is impermissible, and it is the duty of the trial court to select the counts on which to impose sentence when the jury returns verdicts of guilty under both statutes. *United States v. Johnson*, 589 F.2d 716 (D.C. Cir. 1978).

Previous convictions not requiring mandatory minimum sentence. — Previous robbery convictions which are not convictions for a crime of violence while armed are not crimes requiring a mandatory minimum sentence under subsection (a) (2) of this section. *Fields v. United States*, App. D.C., 396 A.2d 990 (1979), cert. denied, 464 U.S. 998, 104 S. Ct. 497, 78 L. Ed. 2d 690 (1983).

Mandatory minimum sentence not warranted. — A reasonable jury could not have found that defendant had armed himself with a firearm, as distinct from having it "readily available" for use in his drug operation; therefore, the mandatory minimum sentence of five years was not warranted. *Morton v. United States*, App. D.C., 620 A.2d 1338 (1993).

Section does not require that second crime occur after sentence for prior crime. *United States v. Bridgeman*, 523 F.2d 1099 (D.C. Cir. 1975), cert. denied, 425 U.S. 961, 96 S. Ct. 1744, 48 L. Ed. 2d 206 (1976).

Where convictions for armed robbery and assault with intent to commit robbery while armed precede the sentencing for an armed robbery committed after said offenses, the mandatory minimum sentence is required, though the subsequent armed robbery was committed before the conviction for the prior armed robberies and the assault. *United States v. Hilliard*, App. D.C., 366 A.2d 437 (1976).

Enhancement provisions for crime of violence may apply to convictions also subject to mandatory minimum sentence. — Trial court erred when, over objection, it refused to apply the sentence enhancement provisions of this section to convictions for "crimes of violence," as defined in § 22-3201; a defendant subject to a mandatory minimum sentence as a result of a conviction under § 22-3204(b) may also be subject to the en-

hancement provisions of this section. *Hanna v. United States*, 666 A.2d 845 (D.C. App. 1995).

Duty of trial court. — Section 23-111(b), dealing with the manner in which prior convictions are presented to the court to enhance sentencing under subsection (a)(2) of this section, requires that the trial court inquire whether the defendant affirms or denies that he has been convicted previously as alleged in the information and inform him that if he does not make his challenge now his opportunity will be lost. *Fields v. United States*, App. D.C., 396 A.2d 990 (1979), cert. denied, 464 U.S. 998, 104 S. Ct. 497, 78 L. Ed. 2d 690 (1983).

Improper sentence. — A sentence of 20 years to life imposed on a conviction of armed robbery is improper. *Goins v. United States*, App. D.C., 353 A.2d 298 (1976).

Youth subject to sentencing under this section. — Where a youth is found guilty of unlawful entry, he is subject to sentencing under this section. *United States v. Lewis*, 447 F.2d 1262 (D.C. Cir. 1971).

Convictions occurring before section's effective date included. — A conviction occurring before the effective date of this section is included within paragraph (1) of subsection (d) of this section. *United States v. Thomas*, 485 F.2d 1012 (D.C. Cir. 1973).

No new trial where unlikely additional evidence would produce different result. — A defendant who has been convicted of assault with intent to commit robbery and armed robbery is not entitled to a new trial on the ground of newly discovered evidence where it is unlikely that the additional evidence would produce a different result. *Quick v. United States*, App. D.C., 316 A.2d 875 (1974).

Conviction not precluded by prior mistrial where jury made no findings. — The fact that a mistrial is declared in a prosecution for armed robbery does not, under the doctrine of collateral estoppel, preclude a conviction for armed robbery in a second prosecution where the jury in the first trial made no findings. *United States v. Perry*, 504 F.2d 180 (D.C. Cir. 1974).

Government estopped from introducing evidence from first trial. — Where in the first trial the jury acquitted defendant of use of an automobile without the owner's consent, armed robbery and assault with a dangerous weapon, the government was collaterally estopped from having the evidence supporting those counts admitted against the defendant in a second trial charging him with making 4 sawed-off shotguns, first degree murder while armed, second degree murder while armed, unlawful possession of 5 sawed-off shotguns and being an accessory after the fact to first degree and second degree murder. *United States v. Day*, 591 F.2d 861 (D.C. Cir. 1978).

Where acquittal not raised at second trial, double jeopardy defense raised. —

Where the defendant does not raise at his second trial the issue that his acquittal of armed robbery at his first trial was an acquittal of unarmed robbery as well, he waives the defense of double jeopardy. *United States v. Scott*, 464 F.2d 832 (D.C. Cir. 1972).

Cited in *United States v. Pugh*, 436 F.2d 222 (D.C. Cir. 1970); *Bland v. Rodgers*, 332 F. Supp. 989 (D.D.C. 1971); *United States v. Parker*, 442 F.2d 779 (D.C. Cir. 1971); *United States v. Trantham*, 448 F.2d 1036 (D.C. Cir. 1971); *United States v. Hinkle*, 448 F.2d 1157 (D.C. Cir. 1971); *United States v. Thomas*, 450 F.2d 1355 (D.C. Cir. 1971); *United States v. Jones*, 459 F.2d 1225 (D.C. Cir. 1972); *United States v. Lee*, 459 F.2d 1365 (D.C. Cir. 1972); *United States v. King*, 461 F.2d 152 (D.C. Cir. 1972); *United States v. Thomas*, 463 F.2d 314 (D.C. Cir.), cert. denied, 409 U.S. 870, 93 S. Ct. 198, 34 L. Ed. 2d 120 (1972); *United States v. Rucker*, 464 F.2d 823 (D.C. Cir. 1972); *United States v. Thompson*, 465 F.2d 583 (D.C. Cir. 1972); *United States v. Mack*, 466 F.2d 333 (D.C. Cir.), cert. denied, 409 U.S. 952, 93 S. Ct. 297, 34 L. Ed. 2d 223 (1972); *United States v. Hill*, 470 F.2d 361 (D.C. Cir. 1972); *United States v. Howard*, 470 F.2d 406 (D.C. Cir. 1972); *United States v. Zeiger*, 475 F.2d 1280 (D.C. Cir. 1972); *United States v. Carter*, 475 F.2d 349 (D.C. Cir. 1973); *United States v. Anderson*, 490 F.2d 785 (D.C. Cir. 1974); *Smith v. United States*, App. D.C., 315 A.2d 163, cert. denied, 419 U.S. 896, 95 S. Ct. 174, 42 L. Ed. 2d 139 (1974); *United States v. Rawls*, App. D.C., 322 A.2d 903 (1974); *Matthews v. United States*, App. D.C., 322 A.2d 908 (1974); *Shelton v. United States*, App. D.C., 323 A.2d 717 (1974); *Crawley v. United States*, App. D.C., 328 A.2d 777 (1974); *United States v. Thorne*, 527 F.2d 840 (D.C. Cir. 1975); *Williams v. United States*, App. D.C., 382 A.2d 1 (1978); *Nowlin v. United States*, App. D.C., 382 A.2d 9 (1978); *Harling v. United States*, App. D.C., 382 A.2d 845 (1978); *Crosby v. United States*, App. D.C., 383 A.2d 351, cert. denied, 439 U.S. 849, 99 S. Ct. 152, 58 L. Ed. 2d 152 (1978); *Singletary v. United States*, App. D.C., 383 A.2d 1064 (1978); *Cole v. United States*, App. D.C., 384 A.2d 651 (1978); *Samuels v. United States*, App. D.C., 385 A.2d 16 (1978); *Givens v. United States*, App. D.C., 385 A.2d 24 (1978); *Williams v. United States*, App. D.C., 385 A.2d 760 (1978); *Dockery v. United States*, App. D.C., 385 A.2d 767 (1978); *Cureton v. United States*, App. D.C., 386 A.2d 278 (1978); *Sellman v. United States*, App. D.C., 386 A.2d 303 (1978); *Ward v. United States*, App. D.C., 386 A.2d 1180 (1978); *Wright v. United States*, App. D.C., 387 A.2d 582 (1978); *Brown v. United States*, App. D.C., 387 A.2d 728 (1978); *Harling v. United States*, App. D.C., 387 A.2d 1101 (1978); *Rink v. United States*,

App. D.C., 388 A.2d 52 (1978); *Brown v. United States*, App. D.C., 388 A.2d 451 (1978); *Cotton v. United States*, App. D.C., 388 A.2d 865 (1978); *Sinclair v. United States*, App. D.C., 388 A.2d 1201 (1978), cert. denied, 439 U.S. 1118, 99 S. Ct. 1026, 59 L. Ed. 2d 77 (1979); *Smith v. United States*, App. D.C., 389 A.2d 1356, cert. denied, 439 U.S. 1048, 99 S. Ct. 726, 58 L. Ed. 2d 707 (1978); *Smith v. United States*, App. D.C., 389 A.2d 1364 (1978); *Shambley v. United States*, App. D.C., 391 A.2d 264 (1978); *Adair v. United States*, App. D.C., 391 A.2d 288 (1978); *Gaither v. United States*, App. D.C., 391 A.2d 1364 (1978); *Scott v. United States*, App. D.C., 392 A.2d 4 (1978); *Smith v. United States*, App. D.C., 392 A.2d 990 (1978); *Evans v. United States*, App. D.C., 392 A.2d 1015 (1978); *Bridges v. United States*, App. D.C., 392 A.2d 1053 (1978), cert. denied, 440 U.S. 938, 99 S. Ct. 1286, 59 L. Ed. 2d 498 (1979); *McBride v. United States*, App. D.C., 393 A.2d 123 (1978), cert. denied, 440 U.S. 927, 99 S. Ct. 1260, 59 L. Ed. 2d 482 (1979); *Peoples v. United States*, App. D.C., 395 A.2d 41 (1978), cert. denied, 442 U.S. 911, 99 S. Ct. 2826, 61 L. Ed. 2d 277 (1979); *Reavis v. United States*, App. D.C., 395 A.2d 75 (1978); *Harvey v. United States*, App. D.C., 395 A.2d 92 (1978), cert. denied, 441 U.S. 936, 99 S. Ct. 2061, 60 L. Ed. 2d 665 (1979); *Braxton v. United States*, App. D.C., 395 A.2d 759 (1978); *Brooks v. United States*, App. D.C., 396 A.2d 200 (1978); *Fields v. United States*, App. D.C., 396 A.2d 522 (1978); *United States v. Day*, 591 F.2d 861 (D.C. Cir. 1978); *Washington v. United States*, App. D.C., 397 A.2d 946 (1979); *Johnson v. United States*, App. D.C., 398 A.2d 354 (1979); *O'Connor v. United States*, App. D.C., 399 A.2d 21 (1979); *Vance v. United States*, App. D.C., 399 A.2d 52 (1979); *Gillis v. United States*, App. D.C., 400 A.2d 311 (1979); *Sousa v. United States*, App. D.C., 400 A.2d 1036, cert. denied, 444 U.S. 981, 100 S. Ct. 484, 62 L. Ed. 2d 408 (1979); *Middleton v. United States*, App. D.C., 401 A.2d 109 (1979); *Jones v. United States*, App. D.C., 401 A.2d 473 (1979); *Sellers v. United States*, App. D.C., 401 A.2d 974 (1979); *Letsinger v. United States*, App. D.C., 402 A.2d 411 (1979); *Beck v. United States*, App. D.C., 402 A.2d 418 (1979); *Roberts v. United States*, App. D.C., 402 A.2d 441 (1979); *Morgan v. United States*, App. D.C., 402 A.2d 598 (1979); *Smothers v. United States*, App. D.C., 403 A.2d 306 (1979); *Rease v. United States*, App. D.C., 403 A.2d 322 (1979); *Sampson v. United States*, App. D.C., 407 A.2d 574 (1979); *Ibn-Tamas v. United States*, App. D.C., 407 A.2d 626 (1979); *Khaalil v. United States*, App. D.C., 408 A.2d 313 (1979), cert. denied, 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781 (1980); *Bean v. United States*, App. D.C., 409 A.2d 1064 (1979); *Hallman v. United States*, App. D.C., 410 A.2d 215 (1979); *Jackson v. United States*, App. D.C., 420 A.2d 1202

(1979); *United States v. Wood*, 628 F.2d 554 (D.C. Cir. 1980); *United States v. Crews*, 445 U.S. 463, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980); *Bittle v. United States*, App. D.C., 410 A.2d 1383 (1980); *Fowler v. United States*, App. D.C., 411 A.2d 618, cert. denied, 446 U.S. 985, 100 S. Ct. 2967, 64 L. Ed. 2d 841 (1980); *Bridgeford v. United States*, App. D.C., 411 A.2d 633 (1980); *Williams v. United States*, App. D.C., 412 A.2d 17 (1980); *In re T.L.J.*, App. D.C., 413 A.2d 154 (1980); *Smith v. United States*, App. D.C., 414 A.2d 1189 (1980); *Cooper v. United States*, App. D.C., 415 A.2d 528 (1980); *Pegues v. United States*, App. D.C., 415 A.2d 1374 (1980); *Jones v. United States*, App. D.C., 416 A.2d 1236 (1980); *Morrison v. United States*, App. D.C., 417 A.2d 409 (1980); *Mangrum v. United States*, App. D.C., 418 A.2d 1071, cert. denied, 449 U.S. 997, 101 S. Ct. 539, 66 L. Ed. 2d 296 (1980); *Tillery v. United States*, App. D.C., 419 A.2d 970 (1980); *Bundy v. United States*, App. D.C., 422 A.2d 765 (1980); *United States v. Brown*, App. D.C., 422 A.2d 1281 (1980); *Obregon v. United States*, App. D.C., 423 A.2d 200 (1980), cert. denied, 452 U.S. 918, 101 S. Ct. 3054, 69 L. Ed. 2d 422 (1981); *United States v. Patterson*, 652 F.2d 1046 (D.C. Cir.), cert. denied, 454 U.S. 904, 102 S. Ct. 412, 70 L. Ed. 2d 223 (1981); *Bryant v. Civiletti*, 663 F.2d 286 (D.C. Cir. 1981); *United States v. Leek*, 665 F.2d 383 (D.C. Cir. 1981); *Dobson v. United States*, App. D.C., 426 A.2d 361 (1981); *Towles v. United States*, App. D.C., 428 A.2d 836 (1981); *Streater v. United States*, App. D.C., 429 A.2d 173 (1980), appeal dismissed and cert. denied, 451 U.S. 902, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981); *Winestock v. United States*, App. D.C., 429 A.2d 519 (1981); *Clayton v. United States*, App. D.C., 429 A.2d 1381 (1981); *Lewis v. United States*, App. D.C., 430 A.2d 528, cert. denied, 454 U.S. 1081, 102 S. Ct. 635, 70 L. Ed. 2d 615 (1981); *United States v. Nunzio*, App. D.C., 430 A.2d 1372 (1981); *Allen v. United States*, App. D.C., 431 A.2d 27 (1981); *Giles v. United States*, App. D.C., 432 A.2d 739 (1981); *Austin v. United States*, App. D.C., 433 A.2d 1081 (1981); *Washington v. United States*, App. D.C., 434 A.2d 394 (1981); *Johnson v. United States*, App. D.C., 434 A.2d 415 (1981); *Hill v. United States*, App. D.C., 434 A.2d 422 (1981), cert. denied, 454 U.S. 1151, 102 S. Ct. 1020, 71 L. Ed. 2d 307 (1982); *Johns v. United States*, App. D.C., 434 A.2d 463 (1981); *Coligan v. United States*, App. D.C., 434 A.2d 483 (1981); *Hilton v. United States*, App. D.C., 435 A.2d 383 (1981); *Morris v. United States*, App. D.C., 436 A.2d 377 (1981); *Asbell v. United States*, App. D.C., 436 A.2d 804 (1981); *Warren v. United States*, App. D.C., 436 A.2d 821 (1981); *Lucas v. United States*, App. D.C., 436 A.2d 1282 (1981); *Sweet v. United States*, App. D.C., 438 A.2d 447 (1981); *Little v. United States*, App. D.C., 438 A.2d 1264 (1981); *In re C.P.*, App. D.C., 439 A.2d

460 (1981); *United States v. Green*, 680 F.2d 183 (D.C. Cir. 1982), cert. denied, 459 U.S. 1210, 103 S. Ct. 1204, 75 L. Ed. 2d 445 (1983); *United States v. Johnson*, 549 F. Supp. 78 (D.D.C. 1982); *Harris v. United States*, App. D.C., 441 A.2d 268 (1982); *Jones v. United States*, App. D.C., 441 A.2d 1004 (1982); *Lagon v. United States*, App. D.C., 442 A.2d 166 (1982); *Miller v. United States*, App. D.C., 444 A.2d 13 (1982); *Perkins v. United States*, App. D.C., 446 A.2d 19 (1982); *Brooks v. United States*, App. D.C., 448 A.2d 253 (1982); *Watts v. United States*, App. D.C., 449 A.2d 308 (1982); *Sweet v. United States*, App. D.C., 449 A.2d 315 (1982); *Dobson v. United States*, App. D.C., 449 A.2d 1082 (1982), cert. denied, 464 U.S. 831, 104 S. Ct. 109, 78 L. Ed. 2d 111 (1983); *United States v. Jackson*, App. D.C., 450 A.2d 419 (1982); *Keitt v. United States*, App. D.C., 450 A.2d 461 (1982); *United States v. Donaldson*, App. D.C., 451 A.2d 51 (1982), cert. denied, 464 U.S. 838, 104 S. Ct. 128, 78 L. Ed. 2d 124 (1983); *Parks v. United States*, App. D.C., 451 A.2d 591 (1982), cert. denied, 461 U.S. 945, 103 S. Ct. 2123, 77 L. Ed. 2d 1303 (1983); *Head v. United States*, App. D.C., 451 A.2d 615 (1982); *Cornwell v. United States*, App. D.C., 451 A.2d 628 (1982); *Taylor v. United States*, App. D.C., 451 A.2d 859 (1982), cert. denied, 461 U.S. 936, 103 S. Ct. 2105, 77 L. Ed. 2d 311 (1983); *United States v. McClurkin*, 110 WLR 1657 (Super. Ct. 1982); *McKeamer v. United States*, App. D.C., 452 A.2d 348 (1982); *Johnson v. United States*, App. D.C., 452 A.2d 959 (1982); *Howard v. United States*, App. D.C., 452 A.2d 966 (1982), cert. denied, 460 U.S. 1087, 103 S. Ct. 1782, 76 L. Ed. 2d 352 (1983); *Reed v. United States*, App. D.C., 452 A.2d 1173 (1982), cert. denied, 464 U.S. 839, 104 S. Ct. 132, 78 L. Ed. 2d 127 (1983); *Jones v. United States*, App. D.C., 452 A.2d 1185 (1982); *Benjamin v. United States*, App. D.C., 453 A.2d 810 (1982); *Hall v. United States*, App. D.C., 454 A.2d 314 (1982); *Lee v. United States*, App. D.C., 454 A.2d 770 (1982), cert. denied, 464 U.S. 972, 104 S. Ct. 409, 78 L. Ed. 2d 349 (1983); *McClinnahan v. United States*, App. D.C., 454 A.2d 1340 (1982), cert. denied, 464 U.S. 867, 104 S. Ct. 205, 78 L. Ed. 2d 179 (1983); *Powell v. United States*, App. D.C., 455 A.2d 405 (1982); *United States v. Singleton*, 702 F.2d 1159 (D.C. Cir. 1983); *Smith v. United States*, App. D.C., 454 A.2d 822 (1983); *Burrell v. United States*, App. D.C., 455 A.2d 1373 (1983); *McCowan v. United States*, App. D.C., 458 A.2d 1191 (1983); *Fornah v. United States*, App. D.C., 460 A.2d 556 (1983); *McClain v. United States*, App. D.C., 460 A.2d 562 (1983); *Hawkins v. United States*, App. D.C., 461 A.2d 1025 (1983), cert. denied, 464 U.S. 1052, 104 S. Ct. 734, 79 L. Ed. 2d 193 (1984); *Beale v. United States*, App. D.C., 465 A.2d 796 (1983), cert. denied, 465 U.S. 1030, 104 S. Ct. 1293, 79 L. Ed. 2d 694 (1984); *Adams*

v. United States, App. D.C., 466 A.2d 439 (1983); *Fields v. United States*, App. D.C., 466 A.2d 822, cert. denied, 464 U.S. 998, 104 S. Ct. 497, 78 L. Ed. 2d 690 (1983); *Welch v. United States*, App. D.C., 466 A.2d 829 (1983); *Merriweather v. United States*, App. D.C., 466 A.2d 853 (1983); *Staton v. United States*, App. D.C., 466 A.2d 1245 (1983); *Reese v. United States*, App. D.C., 467 A.2d 152 (1983); *United States v. Venable*, 111 WLR 2241 (Super. Ct. 1983); *In re C.L.W.*, App. D.C., 467 A.2d 706 (1983); *Willis v. United States*, App. D.C., 468 A.2d 1320 (1983); *Morris v. United States*, App. D.C., 469 A.2d 432 (1983); *Smith v. United States*, App. D.C., 470 A.2d 315 (1983), cert. denied, 469 U.S. 1218, 105 S. Ct. 1201, 84 L. Ed. 2d 344 (1985); *Washington v. United States*, App. D.C., 470 A.2d 729 (1983), cert. denied, 481 U.S. 1030, 107 S. Ct. 1957, 95 L. Ed. 2d 530 (1987); *Sherer v. United States*, App. D.C., 470 A.2d 732 (1983), cert. denied, 469 U.S. 931, 105 S. Ct. 325, 83 L. Ed. 2d 262 (1984); *Johnson v. United States*, App. D.C., 470 A.2d 756 (1983); *Wheeler v. United States*, App. D.C., 470 A.2d 761 (1983); *Pennington v. United States*, App. D.C., 471 A.2d 250 (1983); *Colbert v. United States*, App. D.C., 471 A.2d 258 (1984); *Bruce v. United States*, App. D.C., 471 A.2d 1005 (1984); *Bedney v. United States*, App. D.C., 471 A.2d 1022 (1984); *Fitzgerald v. United States*, App. D.C., 472 A.2d 52 (1984); *Wood v. United States*, App. D.C., 472 A.2d 408 (1984); *Brown v. United States*, App. D.C., 474 A.2d 161 (1984); *Sherrod v. United States*, App. D.C., 478 A.2d 644 (1984); *Williams v. United States*, App. D.C., 481 A.2d 1303 (1984); *Coates v. United States*, App. D.C., 482 A.2d 1239 (1984), cert. denied, 472 U.S. 1030, 105 S. Ct. 3507, 87 L. Ed. 2d 637 (1985); *In re E.G.*, App. D.C., 482 A.2d 1243 (1984); *Rogers v. United States*, App. D.C., 483 A.2d 277 (1984), cert. denied, 469 U.S. 1227, 105 S. Ct. 1223, 84 L. Ed. 2d 362 (1985); *White v. United States*, App. D.C., 484 A.2d 553 (1984); *Douglas v. United States*, App. D.C., 488 A.2d 121 (1985); *Jackson v. United States*, App. D.C., 490 A.2d 192 (1985); *Collins v. United States*, App. D.C., 491 A.2d 480 (1985), cert. denied, 475 U.S. 1124, 106 S. Ct. 1646, 90 L. Ed. 2d (1986); *Smith v. United States*, App. D.C., 491 A.2d 1144 (1985); *Allen v. United States*, App. D.C., 495 A.2d 1145 (1985); *Lucas v. United States*, App. D.C., 497 A.2d 1070 (1985), cert. denied, 475 U.S. 1111, 106 S. Ct. 1523, 89 L. Ed. 2d 920 (1986); *Cox v. United States*, App. D.C., 498 A.2d 231 (1985); *Davis v. United States*, App. D.C., 498 A.2d 242 (1985); *Hammill v. United States*, App. D.C., 498 A.2d 551 (1985); *Washington v. United States*, App. D.C., 499 A.2d 95 (1985); *In re C.B.N.*, App. D.C., 499 A.2d 1215 (1985); *Hairston v. United States*, App. D.C., 500 A.2d 994 (1985); *Pryor v. United States*, App. D.C., 503 A.2d 678 (1986); *Hawthorne v. United States*, App. D.C., 504

A.2d 580, cert. denied, 479 U.S. 992, 107 S. Ct. 593, 93 L. Ed. 2d 594 (1986); *Foreman v. United States*, App. D.C., 506 A.2d 1124 (1986); *Black v. United States*, App. D.C., 506 A.2d 1130 (1986); *Snipes v. United States*, App. D.C., 507 A.2d 159 (1986); *Saunders v. United States*, App. D.C., 508 A.2d 92 (1986); *Scutchings v. United States*, App. D.C., 509 A.2d 634 (1986); *Arnold v. United States*, App. D.C., 511 A.2d 399 (1986); *United States v. Brooks*, 114 WLR 437 (Super. Ct. 1986); *Brown v. United States*, App. D.C., 518 A.2d 415 (1986), cert. denied, 485 U.S. 978, 108 S. Ct. 1274, 99 L. Ed. 2d 485 (1988); *United States v. Jackson*, 824 F.2d 21 (D.C. Cir. 1987), cert. denied, 484 U.S. 1013, 108 S. Ct. 715, 98 L. Ed. 2d 665 (1988); *Driver v. United States*, App. D.C., 521 A.2d 254 (1987); *Towles v. United States*, App. D.C., 521 A.2d 651, cert. denied, 483 U.S. 1008, 107 S. Ct. 3236, 97 L. Ed. 2d 741 (1987); *Williams v. United States*, App. D.C., 521 A.2d 663 (1987); *Settles v. United States*, App. D.C., 522 A.2d 348 (1987); *Lucas v. United States*, App. D.C., 522 A.2d 876 (1987); *Stevenson v. United States*, App. D.C., 522 A.2d 1280 (1987); *Fletcher v. United States*, App. D.C., 524 A.2d 40 (1987); *Watson v. United States*, App. D.C., 524 A.2d 736 (1987); *Briggs v. United States*, App. D.C., 525 A.2d 583 (1987); *Warrick v. United States*, App. D.C., 528 A.2d 438 (1987); *Barnes v. United States*, App. D.C., 529 A.2d 284 (1987); *Bartley v. United States*, App. D.C., 530 A.2d 692 (1987); *Hollingsworth v. United States*, App. D.C., 531 A.2d 973 (1987); *Price v. United States*, App. D.C., 531 A.2d 984 (1987); *Waller v. United States*, App. D.C., 531 A.2d 994 (1987); *Haigler v. United States*, App. D.C., 531 A.2d 1236 (1987); *Easton v. United States*, App. D.C., 533 A.2d 904 (1987); *Shepard v. United States*, App. D.C., 533 A.2d 1278 (1987); *Gibson v. United States*, App. D.C., 536 A.2d 78 (1987); *Beard v. United States*, App. D.C., 535 A.2d 1373 (1988); *Brooks v. United States*, App. D.C., 536 A.2d 1091 (1988); *Hall v. United States*, App. D.C., 540 A.2d 442 (1988); *Vines v. United States*, App. D.C., 540 A.2d 1107 (1988); *United States v. Williams*, 116 WLR 1005 (Super. Ct. 1988); *United States v. Peoples*, 116 WLR 1161 (Super. Ct. 1988); *Johnson v. United States*, App. D.C., 544 A.2d 270 (1988); *Thomas v. United States*, App. D.C., 544 A.2d 1260 (1988); *Ellerbe v. United States*, App. D.C., 545 A.2d 1197, cert. denied, 488 U.S. 868, 109 S. Ct. 174, 102 L. Ed. 2d 144 (1988); *Catlett v. United States*, App. D.C., 545 A.2d 1202 (1988), cert. denied, 488 U.S. 1017, 109 S. Ct. 814, 102 L. Ed. 2d 803 (1989); *Wesley v. United States*, App. D.C., 547 A.2d 1022 (1988); *Harris v. Ferguson*, 116 WLR 1981 (Super. Ct. 1988); *Singley v. United States*, App. D.C., 548 A.2d 780 (1988); *Hunter v. United States*, App. D.C., 548 A.2d 806 (1988); *Morris v. United States*, App. D.C., 548 A.2d 1383 (1988); *Townsend v. United*

States, App. D.C., 549 A.2d 724 (1988), cert. denied, 490 U.S. 1102, 109 S. Ct. 2457, 104 L. Ed. 2d 1011 (1989); *Sanders v. United States*, App. D.C., 550 A.2d 343 (1988); *McKinnon v. United States*, App. D.C., 550 A.2d 915 (1988); *Warrick v. United States*, App. D.C., 551 A.2d 1332 (1988); *Sturdivant v. United States*, App. D.C., 551 A.2d 1338 (1988), cert. denied, 493 U.S. 956, 110 S. Ct. 370, 107 L. Ed. 2d 356 (1989); *Kerns v. United States*, App. D.C., 551 A.2d 1336 (1989); *Smith v. United States*, App. D.C., 554 A.2d 1155 (1989); *Thomas v. United States*, App. D.C., 557 A.2d 599 (1989); *Dew v. United States*, App. D.C., 558 A.2d 1112 (1989); *Coates v. United States*, App. D.C., 558 A.2d 1148 (1989); *Garris v. United States*, App. D.C., 559 A.2d 323 (1989); *Scott v. United States*, App. D.C., 559 A.2d 745 (1989); *Landrum v. United States*, App. D.C., 559 A.2d 1323 (1989); *Edelen v. United States*, App. D.C., 560 A.2d 527 (1989); *Johnson v. United States*, App. D.C., 562 A.2d 603 (1989); *Seeney v. United States*, App. D.C., 563 A.2d 1081 (1989), cert. denied, 498 U.S. 858, 111 S. Ct. 158, 112 L. Ed. 2d 124 (1990); *Roper v. United States*, App. D.C., 564 A.2d 726 (1989); *Wright v. United States*, App. D.C., 564 A.2d 734 (1989); *Holt v. United States*, App. D.C., 565 A.2d 970 (1989); *Martin v. United States*, App. D.C., 567 A.2d 896 (1989); *United States v. McNeil*, 911 F.2d 768 (D.C. Cir. 1990); *Ramos v. United States*, App. D.C., 569 A.2d 158 (1990); *Tucker v. United States*, App. D.C., 569 A.2d 162 (1990); *Solomon v. United States*, App. D.C., 569 A.2d 1185 (1990); *Brown v. United States*, App. D.C., 576 A.2d 731 (1990); *David v. United States*, App. D.C., 579 A.2d 1172 (1990); *Rice v. United States*, App. D.C., 580 A.2d 119 (1990); *United States v. Alston*, App. D.C., 580 A.2d 587 (1990); *James v. United States*, App. D.C., 580 A.2d 636 (1990); *Bass v. United States*, App. D.C., 580 A.2d 669 (1990); *United States v. Barnes*, 118 WLR 1709 (Super. Ct. 1990); *United States v. Jones*, 118 WLR 1837 (Super. Ct. 1990); *Holmes v. United States*, App. D.C., 580 A.2d 1259 (1990); *Green v. United States*, App. D.C., 580 A.2d 1325 (1990); *Ali v. United States*, App. D.C., 581 A.2d 368 (1990), cert. denied, 502 U.S. 893, 112 S. Ct. 259, 116 L. Ed. 2d 213 (1991); *Strong v. United States*, App. D.C., 581 A.2d 383 (1990); *Harper v. United States*, App. D.C., 582 A.2d 485 (1990); *Wilkins v. United States*, App. D.C., 582 A.2d 939 (1990); *Doe v. United States*, App. D.C., 583 A.2d 670 (1990); *Goodall v. United States*, App. D.C., 584 A.2d 560 (1990); *United States v. Edmond*, 924 F.2d 261 (D.C. Cir.), cert. denied, 502 U.S. 838, 112 S. Ct. 125, 116 L. Ed. 2d 92 (1991); *Coreas v. United States*, App. D.C., 585 A.2d 1376, cert. denied, 502 U.S. 855, 112 S. Ct. 167, 116 L. Ed. 2d 130 (1991); *Russell v. United States*, App. D.C., 586 A.2d 695 (1991); *Lumpkin v. United States*, App. D.C., 586 A.2d 701, cert. denied, 502 U.S.

- 849, 112 S. Ct. 151, 116 L. Ed. 2d 116 (1991); Vereen v. United States, App. D.C., 587 A.2d 456 (1991); Powers v. United States, App. D.C., 588 A.2d 1166 (1991); Gray v. United States, App. D.C., 589 A.2d 912 (1991); Kelly v. United States, App. D.C., 590 A.2d 1031 (1991); Hunter v. United States, App. D.C., 590 A.2d 1048 (1991); Marrow v. United States, App. D.C., 592 A.2d 1042 (1991); Clark v. United States, App. D.C., 593 A.2d 186 (1991); Harris v. United States, App. D.C., 594 A.2d 546 (1991); Caldwell v. United States, App. D.C., 595 A.2d 961 (1991); Felder v. United States, App. D.C., 595 A.2d 974 (1991); Winters v. Ridley, App. D.C., 596 A.2d 569 (1991); United States v. Hobbs, 119 WLR 673 (Super. Ct. 1991); Briggs v. United States, App. D.C., 597 A.2d 370 (1991); Johnson v. United States, App. D.C., 597 A.2d 917 (1991); In re D.A., App. D.C., 597 A.2d 1331 (1991); Hazel v. United States, App. D.C., 599 A.2d 38 (1991), cert. denied, 506 U.S. 939, 113 S. Ct. 374, 121 L. Ed. 2d 286 (1992); Mills v. United States, App. D.C., 599 A.2d 775 (1991); Hill v. United States, App. D.C., 600 A.2d 58 (1991); Freeman v. United States, App. D.C., 600 A.2d 1070 (1991); Nelson v. United States, App. D.C., 601 A.2d 582 (1991); Slye v. United States, App. D.C., 602 A.2d 135 (1992); Street v. United States, App. D.C., 602 A.2d 141 (1992); Price v. United States, App. D.C., 602 A.2d 641 (1992); Prophet v. United States, App. D.C., 602 A.2d 1087 (1992); Swanson v. United States, App. D.C., 602 A.2d 1102 (1992); Lucas v. United States, App. D.C., 602 A.2d 1107 (1992); Leonard v. United States, App. D.C., 602 A.2d 1112 (1992); Taylor v. United States, App. D.C., 603 A.2d 451, cert. denied, 506 U.S. 852, 113 S. Ct. 155, 121 L. Ed. 2d 105 (1992); Allen v. United States, App. D.C., 603 A.2d 1219, cert. denied, 505 U.S. 1227, 112 S. Ct. 3050, 120 L. Ed. 2d 916 (1992); Samuels v. United States, App. D.C., 605 A.2d 596 (1992); Bostick v. United States, App. D.C., 605 A.2d 916 (1992); Martin v. United States, App. D.C., 606 A.2d 120 (1991); Yelverton v. United States, App. D.C., 606 A.2d 181 (1992); Hawkins v. United States, App. D.C., 606 A.2d 753 (1992); Harris v. United States, App. D.C., 606 A.2d 763 (1992); Robinson v. United States, App. D.C., 606 A.2d 1368 (1992); Harper v. United States, App. D.C., 608 A.2d 152 (1992); Burgess v. United States, App. D.C., 608 A.2d 733 (1992); Gooch v. United States, App. D.C., 609 A.2d 259 (1992); Mitchell v. United States, App. D.C., 609 A.2d 1099 (1992); Johnson v. United States, App. D.C., 609 A.2d 1112 (1992); Johnson v. United States, App. D.C., 610 A.2d 729 (1992); Dailey v. United States, App. D.C., 611 A.2d 963 (1992); Martin v. United States, App. D.C., 614 A.2d 51 (1992); Halicki v. United States, App. D.C., 614 A.2d 499 (1992); Butler v. United States, App. D.C., 614 A.2d 875, cert. denied, 506 U.S. 1009, 113 S. Ct. 625, 121 L. Ed. 2d 558 (1992); Bond v. United States, App. D.C., 614 A.2d 892 (1992); Foster v. United States, App. D.C., 615 A.2d 213 (1992); Settles v. United States, App. D.C., 615 A.2d 1105 (1992); Johnson v. United States, App. D.C., 616 A.2d 1216 (1992), cert. denied, 507 U.S. 996, 113 S. Ct. 1611, 123 L. Ed. 2d 172 (1993); Farmer v. United States, App. D.C., 616 A.2d 1241 (1992), cert. denied, — U.S. —, 113 S. Ct. 1958, 123 L. Ed. 2d 661 (1993); Ford v. United States, App. D.C., 616 A.2d 1245 (1992); Jenkins v. United States, App. D.C., 617 A.2d 529 (1992); Speaks v. United States, App. D.C., 617 A.2d 942 (1992); Goins v. United States, App. D.C., 617 A.2d 956 (1992); Harris v. United States, App. D.C., 618 A.2d 140 (1992); Brown v. United States, App. D.C., 619 A.2d 1180 (1992); King v. United States, App. D.C., 618 A.2d 727 (1993); Coleman v. United States, App. D.C., 619 A.2d 40 (1993); Scott v. United States, App. D.C., 619 A.2d 917 (1993); Dickerson v. United States, App. D.C., 620 A.2d 270 (1993); Ray v. United States, App. D.C., 620 A.2d 860 (1993); Bennett v. United States, App. D.C., 620 A.2d 1342 (1993); Curington v. United States, App. D.C., 621 A.2d 819 (1993); Morris v. United States, App. D.C., 622 A.2d 1116, cert. denied, — U.S. —, 114 S. Ct. 270, 126 L. Ed. 2d 221 (1993); Marshall v. United States, App. D.C., 623 A.2d 551 (1992); Jackson v. United States, App. D.C., 623 A.2d 571, cert. denied, — U.S. —, 114 S. Ct. 649, 126 L. Ed. 2d 607 (1993); Robinson v. United States, App. D.C., 623 A.2d 1234 (1993); Culp v. United States, App. D.C., 624 A.2d 460 (1993); Jones v. United States, App. D.C., 625 A.2d 281 (1993); Parks v. United States, App. D.C., 627 A.2d 1 (1993); Edelen v. United States, App. D.C., 627 A.2d 968 (1993); Everetts v. United States, App. D.C., 627 A.2d 981 (1993), cert. denied, — U.S. —, 115 S. Ct. 144, 130 L. Ed. 2d 84 (1994); Tibbs v. United States, App. D.C., 628 A.2d 638 (1993); Johnson v. United States, App. D.C., 628 A.2d 1009 (1993); United States v. Harris, App. D.C., 629 A.2d 481 (1993); Cowan v. United States, App. D.C., 629 A.2d 496 (1993); Davis v. United States, App. D.C., 629 A.2d 570 (1993); Matthews v. United States, App. D.C., 629 A.2d 1185 (1993); Poole v. United States, App. D.C., 630 A.2d 1109 (1993), cert. denied, — U.S. —, 115 S. Ct. 160, 130 L. Ed. 2d 98 (1994); Matos v. United States, App. D.C., 631 A.2d 28 (1993); Collins v. United States, App. D.C., 631 A.2d 48 (1993); Wilkes v. United States, App. D.C., 631 A.2d 880 (1993), cert. denied, — U.S. —, 115 S. Ct. 143, 130 L. Ed. 2d 84 (1994); Stratmon v. United States, App. D.C., 631 A.2d 1177 (1993); Freeland v. United States, App. D.C., 631 A.2d 1186 (1993); Simpson v. United States, App. D.C., 632 A.2d 374 (1993); Henderson v. United States, App. D.C., 632 A.2d 419 (1993); McIntyre v. United States, App. D.C., 634 A.2d 940 (1993); Tursio v. United States, App. D.C.,

634 A.2d 1205 (1993); *Kinard v. United States*, App. D.C., 635 A.2d 1297 (1993); *Clark v. United States*, App. D.C., 639 A.2d 76 (1993); *McKinnon v. United States*, App. D.C., 644 A.2d 438, cert. denied, — U.S. —, 115 S. Ct. 523, 130 L. Ed. 2d 428 (1994); *Carey v. United States*, App. D.C., 647 A.2d 56 (1994); *White v. United States*, App. D.C., 647 A.2d 766 (1994); *Martin v. United States*, App. D.C., 647 A.2d 1135 (1994); *Riley v. United States*, App. D.C., 647

A.2d 1165 (1994); *Byers v. United States*, App. D.C., 649 A.2d 279 (1994); *Butler v. United States*, App. D.C., 649 A.2d 563 (1994); *Jackson v. United States*, App. D.C., 650 A.2d 659 (1994); *Mayfield v. United States*, App. D.C., 659 A.2d 1249 (1995); *Trice v. United States*, App. D.C., 662 A.2d 891 (1995); *Lee v. United States*, App. D.C., 668 A.2d 822 (1995); *Harris v. United States*, App. D.C., 668 A.2d 839 (1995).

§ 22-3202.1. Gun free zones; enhanced penalty.

(a) All areas within 1000 feet of a public or private day care center, elementary school, vocational school, secondary school, college, junior college, or university, or any public swimming pool, playground, video arcade, or youth center, or an event sponsored by any of the above entities shall be declared a gun free zone.

(b) Any person illegally carrying a gun within a gun free zone shall be punished by a fine up to twice that otherwise authorized to be imposed, by a term of imprisonment up to twice that otherwise authorized to be imposed, or both.

(c) The provisions of this section shall not apply to a person legally licensed to carry a firearm in the District of Columbia who lives or works within 1000 feet of a gun free zone or to members of the Army, Navy, Air Force, or Marine Corps of the United States; the National Guard or Organized Reserves when on duty; the Post Office Department or its employees when on duty; marshals, sheriffs, prison, or jail wardens, or their deputies; policemen or other duly-appointed law enforcement officers; officers or employees of the United States duly authorized to carry such weapons; banking institutions; public carriers who are engaged in the business of transporting mail, money, securities, or other valuables; and licensed wholesale or retail dealers. (July 8, 1932, 47 Stat. 650, ch. 465, § 2a, as added Aug. 18, 1994, D.C. Law 10-150, § 3(b), 41 DCR 2594.)

Effect of amendments. — D.C. Law 10-150 added this section.

Legislative history of Law 10-150. — Law 10-150, the “Youth Facilities Firearm Prohibition Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-265, which was referred to the Committee on the Judiciary.

The Bill was adopted on first and second readings on March 1, 1994, and April 12, 1994, respectively. Signed by the Mayor on April 28, 1994, it was assigned Act No. 10-233 and transmitted to both Houses of Congress for its review. D.C. Law 10-150 became effective on August 18, 1994.

§ 22-3203. Unlawful possession of pistol.

(a) No person shall own or keep a pistol, or have a pistol in his or her possession or under his or her control, within the District of Columbia, if:

(1) Such person is a drug addict;

(2) Such person has been convicted in the District of Columbia or elsewhere of a felony;

(3) Such person has been convicted of violating § 22-2701, § 22-2722, or §§ 22-3302 to 22-3306; or

(4) Such person is not licensed under § 22-3210 to sell weapons, and such person has been convicted of violating this chapter.

(b) No person shall keep a pistol for, or intentionally make a pistol available to, such a person, knowing that such person has been so convicted or that such person is a drug addict. Whoever violates this section shall be punished as provided in § 22-3215, unless the violation occurs after such person has been convicted of a violation of this section, in which case such person shall be imprisoned for not more than 10 years. (July 8, 1932, 47 Stat. 651, ch. 465, § 3; June 29, 1953, 67 Stat. 93, ch. 159, § 204(b); 1973 Ed., § 22-3203; May 21, 1994, D.C. Law 10-119, § 15(b), 41 DCR 1639.)

Section references. — This section is referred to in §§ 6-2313, 22-3207, 22-3208, 22-3210 and 24-203.

Effect of amendments. — D.C. Law 10-119 inserted "or her" twice in the introductory language in (a); and substituted "such person" for "he" throughout the section.

Legislative history of Law 10-119. — See note to § 22-3202.

Conviction under this section requires the government to show that defendant had the required possessory or ownership interest, in a pistol, within the District of Columbia, having been previously convicted of a felony. *Reid v. United States*, App. D.C., 466 A.2d 433 (1983).

Satisfactory proof of possessory or ownership interest exists where the government shows that defendant did own, possess or have control of a gun. *Reid v. United States*, App. D.C., 466 A.2d 433 (1983).

Police may seize pistol incidental to authorized search. — It is not unreasonable for police officers to seize a pistol incidental to an authorized search of an apartment. *Curtis v. United States*, App. D.C., 263 A.2d 653 (1970).

Admission of shooting corroborated by testimony of others. — The defendant's admission that he had been playing with a gun and it went off accidentally is sufficiently corroborated by the testimony of another placing the defendant in the room with the victim when the victim was shot and by a detective's testimony that the other person had told him that the defendant accidentally shot the victim. *Coleman v. United States*, App. D.C., 219 A.2d 496, rev'd on other grounds, 397 F.2d 621 (D.C. Cir. 1966).

Prosecutor authorized to charge defendant under § 22-3204. — The prosecutor has the authority to charge the defendant under the felony-repeater provisions of § 22-3204 rather than under this section. *Palmore v. United States*, App. D.C., 290 A.2d 573 (1972), aff'd, 411 U.S. 389, 93 S. Ct. 1670, 36 L. Ed. 2d 342 (1973).

Double jeopardy not valid plea where separate offense charged. — The plea of double jeopardy is not a valid plea in a new

prosecution where the informations charge separate and distinct offenses. *Newman v. United States*, App. D.C., 239 A.2d 152 (1968).

Nor where witnesses unsworn. — In a case where a defendant waives his right to a jury trial and the government enters nolle prosequi after the witnesses have been sworn, but before the first witness begins to testify, jeopardy does not attach and does not bar a subsequent prosecution for carrying a pistol without a license. *Newman v. United States*, 410 F.2d 259 (D.C. Cir.), cert. denied, 396 U.S. 868, 90 S. Ct. 132, 24 L. Ed. 2d 121 (1969).

Presumption of sanity exists despite recent hospitalization for mental disorder.

— Even though a defendant who is charged with making threats in a menacing manner and with unlawfully possessing an automatic pistol has been discharged from a hospital as having recovered from a mental disorder only a short while before the date of the alleged crimes, the usual presumption of sanity exists at the time of trial. *Williams v. United States*, App. D.C., 104 A.2d 828 (1954).

Introduction of the pistol in evidence is not necessary to prove unlawful possession of a pistol. *Coleman v. United States*, App. D.C., 219 A.2d 496, rev'd on other grounds, 397 F.2d 621 (D.C. Cir. 1966).

Effective assistance of counsel. — Counsel who is a defense attorney with many years of experience and who presents all substantial defenses, makes appropriate motions and objections, attempts to suppress the evidence on a charge of unlawful possession of a pistol, and is able to obtain an acquittal on a charge of threats to do bodily harm and a directed verdict on a charge of assault by threatening in a menacing manner is not ineffective. *Gressette v. United States*, App. D.C., 256 A.2d 418 (1969).

Felony penalty not invoked where no previous conviction. — Where there is no proof that the defendant had ever been convicted previously under this section, the felony penalty cannot be invoked. *Burrell v. United States*, App. D.C., 223 A.2d 377 (1966).

Where judge notified of unauthorized sentence, case remanded for correction. —

Where the United States Attorney writes to the Chief Judge of the Superior Court and to the defendant's counsel, pointing out that the length of the sentence imposed on the appellant for unlawful possession of a pistol was unauthorized because the defendant had not previously been convicted under this section, this requires remanding the case to the trial court for further proceedings to correct the sentence, despite the absence of a motion to correct an illegal sentence pursuant to § 23-110. *Smith v. United States*, App. D.C., 414 A.2d 1189 (1980).

Cited in *Williams v. United States*, App. D.C., 133 A.2d 112 (1957); *Haltiwanger v. United States*, App. D.C., 377 A.2d 1142 (1977); *Givens v. United States*, App. D.C., 385 A.2d 24

(1978); *Jackson v. United States*, App. D.C., 385 A.2d 786 (1978); *Metts v. United States*, App. D.C., 388 A.2d 47 (1978); *Clark v. United States*, App. D.C., 396 A.2d 997 (1979); *Smothers v. United States*, App. D.C., 403 A.2d 306 (1979); *Sampson v. United States*, App. D.C., 407 A.2d 574 (1979); *Dobson v. United States*, App. D.C., 426 A.2d 361 (1981); *Jefferson v. United States*, App. D.C., 463 A.2d 681 (1983); *Fitzgerald v. United States*, App. D.C., 472 A.2d 52 (1984); *Waller v. United States*, App. D.C., 531 A.2d 994 (1987); *United States v. Duncan*, 115 WLR 2517 (Super. Ct. 1987); *Thomas v. United States*, App. D.C., 553 A.2d 1206 (1989); *Gomez v. United States*, App. D.C., 597 A.2d 884 (1991).

§ 22-3204. Carrying concealed weapons; possession of weapons during commission of crime of violence; penalty.

(a) No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in § 22-3215, except that:

(1) A person who violates this section by carrying a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon, in a place other than the person's dwelling place, place of business, or on other land possessed by the person, shall be fined not more than \$5,000 or imprisoned for not more than 5 years, or both; or

(2) If the violation of this section occurs after a person has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or another jurisdiction, the person shall be fined not more than \$10,000 or imprisoned for not more than 10 years, or both.

(b) No person shall within the District of Columbia possess a pistol, machine gun, shotgun, rifle, or any other firearm or imitation firearm while committing a crime of violence or dangerous crime as defined in § 22-3201. Upon conviction of a violation of this subsection, the person may be sentenced to imprisonment for a term not to exceed 15 years and shall be sentenced to imprisonment for a mandatory-minimum term of not less than 5 years and shall not be released on parole, or granted probation or suspension of sentence, prior to serving the mandatory-minimum sentence. (July 8, 1932, 47 Stat. 651, ch. 465, § 4; Nov. 4, 1943, 57 Stat. 586, ch. 296; Aug. 4, 1947, 61 Stat. 743, ch. 469; June 29, 1953, 67 Stat. 94, ch. 159, § 204(c); 1973 Ed., § 22-3204; July 28, 1989, D.C. Law 8-19, § 3(c), 36 DCR 2844; May 8, 1990, D.C. Law 8-120, § 3(c), 37 DCR 24; May 21, 1994, D.C. Law 10-119, § 15(c), 41 DCR 1639; Aug. 20, 1994, D.C. Law 10-151, § 302, 41 DCR 2608.)

- I. General Consideration.
- II. Elements.
 - A. In General.
 - B. Possession.
 - C. Without a License.
 - D. Intent.
 - E. Deadly or Dangerous Weapon.
 - F. Crime of Violence.
- III. Arrest; Search and Seizure.
- IV. Procedure.
 - A. In General.
 - B. Indictment.
 - C. Defenses.
 - 1. In General.
 - 2. Dwelling House or Place of Business.
 - D. Evidence.
 - E. Instructions.
 - F. Sentencing.
 - 1. In General.
 - 2. Enhanced Punishment Provision.
 - G. Appeal.

I. GENERAL CONSIDERATION.

Section references. — This section is referred to in §§ 22-3205, 24-267, and 24-434.

Effect of amendments. — D.C. Law 10-119, in (a), substituted “the person” for “he” twice, and inserted “or her” three times.

D.C. Law 10-151 rewrote (a).

Neither D.C. Law 10-119 nor D.C. Law 10-151 referred to the other, and effect has been given to D.C. Law 10-151.

Emergency act amendments. — For temporary amendment of section, see § 302 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 8-19. — See note to § 22-3201.

Legislative history of Law 8-120. — See note to § 22-3201.

Legislative history of Law 10-119. — See note to § 22-3202.

Legislative history of Law 10-151. — See note to § 22-3201.

Section constitutional. — This section is not unconstitutional in permitting the imposition of a greater penalty when the accused has been previously convicted. *Kendrick v. United States*, 238 F.2d 34 (D.C. Cir. 1956).

This section is not clearly unconstitutional as a violation of the constitutional right to keep and bear arms. *Williams v. United States*, App. D.C., 237 A.2d 539 (1968).

This section is not unconstitutionally vague or indefinite in its prohibition of objects which are not ordinarily carried about for personal convenience or for a legitimate purpose. *Scott v. United States*, App. D.C., 243 A.2d 54 (1968).

This section and §§ 6-2311 and 6-2361 do not violate the Second Amendment. *Sandidge v. United States*, App. D.C., 520 A.2d 1057, cert. denied, 484 U.S. 868, 108 S. Ct. 193, 98 L. Ed. 2d 145 (1987).

Purpose of section. — This section reflects the purpose of Congress to strengthen the existing law and tighten controls over the possession of dangerous weapons. *United States v. Parker*, App. D.C., 185 A.2d 913 (1962).

The purpose of this section is to protect citizens from actual injury which may be caused by the use of a dangerous weapon. *Strong v. United States*, App. D.C., 581 A.2d 383 (1990).

The purpose of this section is to prescribe the possession of firearms or imitation firearms during a crime of violence or a dangerous crime; it is a gun control provision, which provides for a separate and independent criminal offense. *Thomas v. United States*, App. D.C., 602 A.2d 647 (1992).

Legislative intent. — In enacting this section, Congress intended to drastically tighten the ban on carrying dangerous weapons within the District of Columbia. *Logan v. United States*, App. D.C., 402 A.2d 822 (1979).

Congress' goal in enacting this section was to prevent an individual from carrying an unlicensed pistol on the street because of the danger that such a person would pose to the community as a result of the inherent dangerousness of the weapon he carried, and of the absence of any evidence of his capability to carry safely such a dangerous instrument. *Logan v. United States*, App. D.C., 402 A.2d 822 (1979).

Congress promulgated this section in an effort to curtail the flow of arms on the public streets, and thereby reduce the number of resultant injuries and deaths. *Billinger v. United States*, App. D.C., 425 A.2d 1304 (1981).

The 1990 amendment illustrates a legislative intent to vary the definition of “dangerous weapon” according to the circumstances of its use. When an object is used to coerce others into submitting to illegal requests, what is signifi-

cant is whether the victims believe the item is a weapon. When, however, the item is merely being carried, the question is whether it may actually be used to harm someone. *Strong v. United States*, App. D.C., 581 A.2d 383 (1990).

Scope of section. — The scope of this section is narrow, with the nature of the instrument, whether it is inherently dangerous or rendered so by its use, being irrelevant, and the only inquiry required with respect to the instrument is whether it is a specific instrument, a firearm or imitation firearm, the possession of which is proscribed. *Thomas v. United States*, App. D.C., 602 A.2d 647 (1992).

Purpose of licensure of weapons. — The District of Columbia has a great interest in protecting its citizenry from the dangers inherent in widespread ownership of weapons, and licensure is a legitimate means of attaining that goal. *McMillen v. United States*, App. D.C., 407 A.2d 603 (1979).

Section must be given a strict, rather than a liberal, construction. *Brown v. United States*, App. D.C., 66 A.2d 491 (1949).

Jurisdiction of Superior Court extends to a prosecution for carrying a dangerous weapon. *Martin v. United States*, App. D.C., 283 A.2d 448 (1971).

Construction of section. — Unless there are persuasive reasons to the contrary, this section must be construed according to the ordinary meaning of its words. *Tuten v. United States*, App. D.C., 440 A.2d 1008 (1982), *aff'd*, 460 U.S. 660, 103 S. Ct. 1412, 75 L. Ed. 2d 359 (1983).

This section defines two separate and distinct offenses: (1) carrying a pistol without a license and (2) carrying a dangerous weapon. *Tyree v. United States*, App. D.C., 629 A.2d 20 (1993).

Section not a lesser included offense of federal provision on use of firearm in relation to drug trafficking. — Neither this section, which requires proof that possession of the firearm involved was unlicensed, nor § 22-3214, which includes only offenses involving certain firearms, is a lesser included offense of knowing use of a firearm in relation to a drug trafficking crime, 18 U.S.C. § 924(c)(1). *United States v. Gibbs*, 904 F.2d 52 (D.C. Cir. 1990).

Cited in *Bundy v. United States*, 193 F.2d 694 (D.C. Cir. 1951), cert. denied, 343 U.S. 908, 72 S. Ct. 638, 96 L. Ed. 1326 (1952); *Payton v. United States*, 222 F.2d 794 (D.C. Cir. 1955); *Emburgh v. United States*, App. D.C., 164 A.2d 342 (1960); *Franklin v. United States*, App. D.C., 204 A.2d 341 (1964); *Mosley v. United States*, App. D.C., 209 A.2d 796 (1965); *Johnson v. United States*, 370 F.2d 489 (D.C. Cir. 1966); *Stevenson v. United States*, 380 F.2d 590 (D.C. Cir.), cert. denied, 389 U.S. 962, 88 S. Ct. 347, 19 L. Ed. 2d 375 (1967); *Rouse v. Cameron*, 387 F.2d 241 (D.C. Cir. 1967); *Smith v. United*

States, App. D.C., 235 A.2d 574 (1967); *Conyers v. United States*, App. D.C., 237 A.2d 838 (1968); *Carter v. United States*, App. D.C., 244 A.2d 483 (1968); *United States v. Carter*, 420 F.2d 150 (D.C. Cir. 1969), cert. denied, 397 U.S. 1017, 90 S. Ct. 1253, 25 L. Ed. 2d 432 (1970); *United States v. Grimes*, 421 F.2d 1119 (D.C. Cir. 1969), cert. denied, 398 U.S. 932, 90 S. Ct. 1831, 26 L. Ed. 2d 98 (1970); *Burrell v. United States*, App. D.C., 252 A.2d 897 (1969); *United States v. Cunningham*, 424 F.2d 942 (D.C. Cir.), cert. denied, 399 U.S. 914, 90 S. Ct. 2218, 26 L. Ed. 2d 572 (1970); *United States v. White*, 429 F.2d 711 (D.C. Cir. 1970); *United States v. Johnson*, 432 F.2d 626 (D.C. Cir.), cert. denied, 400 U.S. 949, 91 S. Ct. 257, 27 L. Ed. 2d 255 (1970); *United States v. Wharton*, 433 F.2d 451 (D.C. Cir. 1970); *United States v. Simpson*, 436 F.2d 162 (D.C. Cir. 1970); *United States v. Thurman*, 436 F.2d 280 (D.C. Cir. 1970); *United States v. Free*, 437 F.2d 631 (D.C. Cir. 1970); *United States v. Morris*, 440 F.2d 224 (D.C. Cir. 1970); *Jackson v. United States*, App. D.C., 262 A.2d 106 (1970); *Watson v. United States*, App. D.C., 262 A.2d 121 (1970); *Gaskins v. United States*, App. D.C., 262 A.2d 810 (1970); *United States v. Frye*, App. D.C., 271 A.2d 788 (1970); *United States v. Gaither*, 440 F.2d 262 (D.C. Cir. 1971); *Wade v. United States*, 441 F.2d 1046 (D.C. Cir. 1971); *United States v. Bobbitt*, 450 F.2d 685 (D.C. Cir. 1971); *United States v. Thomas*, 450 F.2d 1355 (D.C. Cir. 1971); *Hurley v. United States*, App. D.C., 273 A.2d 840 (1971); *Shepard v. United States*, App. D.C., 274 A.2d 413 (1971); *United States v. Hobby*, App. D.C., 275 A.2d 235 (1971); *United States v. Jones*, App. D.C., 275 A.2d 541 (1971); *Crawford v. United States*, App. D.C., 278 A.2d 125 (1971); *Brown v. United States*, App. D.C., 278 A.2d 462 (1971); *Davis v. United States*, App. D.C., 284 A.2d 459 (1971); *Jenkins v. United States*, App. D.C., 284 A.2d 460 (1971); *United States v. McCrae*, 459 F.2d 1140 (D.C. Cir. 1972); *United States v. Wheeler*, 459 F.2d 1228 (D.C. Cir. 1972); *United States v. Johnson*, 459 F.2d 1229 (D.C. Cir. 1972); *United States v. Neverson*, 463 F.2d 1224 (D.C. Cir. 1972); *United States v. Green*, 465 F.2d 620 (D.C. Cir. 1972); *United States v. Kyle*, 469 F.2d 547 (D.C. Cir. 1972), cert. denied, 409 U.S. 1117, 93 S. Ct. 920, 34 L. Ed. 2d 700 (1973); *United States v. Zeiger*, 475 F.2d 1280 (D.C. Cir. 1972); *Williams v. United States*, App. D.C., 287 A.2d 814 (1972); *Ruffin v. United States*, App. D.C., 293 A.2d 477 (1972); *Murphy v. United States*, App. D.C., 293 A.2d 849 (1972); *United States v. Walker*, App. D.C., 294 A.2d 376 (1972); *Williams v. United States*, App. D.C., 295 A.2d 503 (1972); *Dickerson v. United States*, App. D.C., 296 A.2d 708 (1972); *Watts v. United States*, App. D.C., 297 A.2d 790 (1972); *United States v. Wimbush*, 475 F.2d 347 (D.C. Cir. 1973); *United*

States v. Lewis, 482 F.2d 632 (D.C. Cir. 1973); Gilchrist v. United States, App. D.C., 300 A.2d 453 (1973); Adams v. United States, App. D.C., 302 A.2d 232 (1973); Tyler v. United States, App. D.C., 302 A.2d 748 (1973); Hawkins v. United States, App. D.C., 304 A.2d 279 (1973); Gordon v. United States, App. D.C., 305 A.2d 522 (1973); Mack v. United States, App. D.C., 310 A.2d 234 (1973); Reed v. United States, App. D.C., 312 A.2d 775 (1973); United States v. Thomas, App. D.C., 314 A.2d 464 (1974); Crawley v. United States, App. D.C., 314 A.2d 487 (1974); Smith v. United States, App. D.C., 315 A.2d 163, cert. denied, 419 U.S. 896, 95 S. Ct. 174, 42 L. Ed. 2d 139 (1974); Lyons v. United States, App. D.C., 315 A.2d 561 (1974); Spencer v. United States, App. D.C., 316 A.2d 331 (1974); Haynes v. United States, App. D.C., 318 A.2d 901 (1974); Galloway v. United States, App. D.C., 326 A.2d 803 (1974), cert. denied, 421 U.S. 979, 95 S. Ct. 1981, 44 L. Ed. 2d 471 (1975); Jefferson v. United States, App. D.C., 328 A.2d 85 (1974); United States v. Ordway, App. D.C., 329 A.2d 776 (1974); Jones v. United States, App. D.C., 330 A.2d 248 (1974); United States v. DeLoach, 530 F.2d 990 (D.C. Cir. 1975), cert. denied, 426 U.S. 909, 96 S. Ct. 2232, 48 L. Ed. 2d 834 (1976); Blango v. United States, App. D.C., 335 A.2d 230 (1975); United States v. Allen, App. D.C., 337 A.2d 512 (1975); Coleman v. United States, App. D.C., 337 A.2d 767 (1975); Sanders v. United States, App. D.C., 339 A.2d 373 (1975); Kendall v. United States, App. D.C., 349 A.2d 464 (1975); United States v. Crowder, 543 F.2d 312 (D.C. Cir. 1976), cert. denied, 429 U.S. 1062, 97 S. Ct. 788, 50 L. Ed. 2d 779 (1977); Quarles v. United States, App. D.C., 349 A.2d 690 (1975), cert. denied, 425 U.S. 972, 96 S. Ct. 2169, 48 L. Ed. 2d 795 (1976); Robinson v. United States, App. D.C., 355 A.2d 567 (1976); Brown v. United States, App. D.C., 359 A.2d 600 (1976); Baylor v. United States, App. D.C., 360 A.2d 42, cert. denied, 429 U.S. 1024, 97 S. Ct. 643, 50 L. Ed. 2d 626 (1976); Perry v. United States, App. D.C., 364 A.2d 617 (1976); Forbes v. United States, App. D.C., 366 A.2d 144 (1976); Johnson v. United States, App. D.C., 366 A.2d 429 (1976); Walden v. United States, App. D.C., 366 A.2d 1075 (1976); United States v. Sheppard, 569 F.2d 114 (D.C. Cir. 1977); Crawford v. United States, App. D.C., 369 A.2d 595 (1977); Harling v. United States, App. D.C., 372 A.2d 1011 (1977); United States v. Perkins, App. D.C., 374 A.2d 882 (1977); Coleman v. United States, App. D.C., 379 A.2d 710 (1977); Lewis v. United States, App. D.C., 379 A.2d 1168 (1977), aff'd, App. D.C., 486 A.2d 729 (1985); United States v. Walker, App. D.C., 380 A.2d 1388 (1977); United States v. Dixon, 446 F. Supp. 58 (D.D.C. 1978); Alston v. United States, App. D.C., 383 A.2d 307 (1978); Crosby v. United States, App. D.C., 383 A.2d 351, cert. denied, 439 U.S. 849, 99 S. Ct. 152, 58 L. Ed. 2d 152 (1978); Allen v. United States, App. D.C., 383 A.2d 363 (1978); Singletary v. United States, App. D.C., 383 A.2d 1064 (1978); Jones v. United States, App. D.C., 385 A.2d 750 (1978); Ward v. United States, App. D.C., 386 A.2d 1180 (1978); Brown v. United States, App. D.C., 387 A.2d 728 (1978); Harling v. United States, App. D.C., 387 A.2d 1101 (1978); Kleinbart v. United States, App. D.C., 388 A.2d 878 (1978); Gibson v. United States, App. D.C., 388 A.2d 1214 (1978); Strickland v. United States, App. D.C., 389 A.2d 1325 (1978), cert. denied, 440 U.S. 926, 99 S. Ct. 1258, 59 L. Ed. 2d 481 (1979); Smith v. United States, App. D.C., 389 A.2d 1356, cert. denied, 439 U.S. 1048, 99 S. Ct. 726, 58 L. Ed. 2d 707 (1978); Glenn v. United States, App. D.C., 391 A.2d 772 (1978); Evans v. United States, App. D.C., 392 A.2d 1015 (1978); Little v. United States, App. D.C., 393 A.2d 94 (1978); Ellis v. United States, App. D.C., 395 A.2d 404 (1978), cert. denied, 442 U.S. 913, 99 S. Ct. 2830, 61 L. Ed. 2d 280 (1979); Fields v. United States, App. D.C., 396 A.2d 522 (1978); United States v. Crawford, 613 F.2d 1045 (D.C. Cir. 1979); Washington v. United States, App. D.C., 397 A.2d 946 (1979); Oesby v. United States, App. D.C., 398 A.2d 1 (1979); O'Connor v. United States, App. D.C., 399 A.2d 21 (1979); Duddles v. United States, App. D.C., 399 A.2d 59 (1979); Lewis v. United States, App. D.C., 399 A.2d 559 (1979); Coombs v. United States, App. D.C., 399 A.2d 1313 (1979); Gillis v. United States, App. D.C., 400 A.2d 311 (1979); Sousa v. United States, App. D.C., 400 A.2d 1036, cert. denied, 444 U.S. 981, 100 S. Ct. 484, 62 L. Ed. 2d 408 (1979); Middleton v. United States, App. D.C., 401 A.2d 109 (1979); Sellars v. United States, App. D.C., 401 A.2d 974 (1979); Grant v. United States, App. D.C., 402 A.2d 405 (1979); Morgan v. United States, App. D.C., 402 A.2d 598 (1979); Smothers v. United States, App. D.C., 403 A.2d 306 (1979); Timus v. United States, App. D.C., 406 A.2d 1269 (1979); Frednak v. United States, App. D.C., 408 A.2d 364 (1979); Stover v. United States, App. D.C., 410 A.2d 188 (1979); United States v. Shelton, 628 F.2d 54 (D.C. Cir. 1980); Bridgeford v. United States, App. D.C., 411 A.2d 633 (1980); United States v. Alston, App. D.C., 412 A.2d 351 (1980); Butler v. United States, App. D.C., 414 A.2d 844 (1980); Pegues v. United States, App. D.C., 415 A.2d 1374 (1980); Jones v. Jackson, App. D.C., 416 A.2d 249 (1980); Mangrum v. United States, App. D.C., 418 A.2d 1071, cert. denied, 449 U.S. 997, 101 S. Ct. 539, 66 L. Ed. 2d 296 (1980); Tillery v. United States, App. D.C., 419 A.2d 970 (1980); Rogers v. United States, App. D.C., 419 A.2d 977 (1980); Bundy v. United States, App. D.C., 422 A.2d 765 (1980); United States v. Durant, 648 F.2d 747 (D.C. Cir. 1981); United States v. Leek, 665 F.2d 383 (D.C. Cir. 1981); Towles v. United States, App. D.C., 428 A.2d 836 (1981);

Clayton v. United States, App. D.C., 429 A.2d 1381 (1981); Mundine v. United States, App. D.C., 431 A.2d 16 (1981); Downing v. United States, App. D.C., 434 A.2d 409 (1981); Hill v. United States, App. D.C., 434 A.2d 422 (1981), cert. denied, 454 U.S. 1151, 102 S. Ct. 1020, 71 L. Ed. 2d 307 (1982); Smith v. District of Columbia, App. D.C., 436 A.2d 53 (1981); Lucas v. United States, App. D.C., 436 A.2d 1282 (1981); United States v. Allen, App. D.C., 436 A.2d 1303 (1981); In re Hurt, App. D.C., 437 A.2d 590 (1981); Ruth v. United States, App. D.C., 438 A.2d 1256 (1981); Little v. United States, App. D.C., 438 A.2d 1264 (1981); United States v. Green, 680 F.2d 183 (D.C. Cir. 1982), cert. denied, 459 U.S. 1210, 103 S. Ct. 1204, 75 L. Ed. 2d 445 (1983); United States v. Kearney, 682 F.2d 214 (D.C. Cir. 1982); United States v. Johnson, 549 F. Supp. 78 (D.D.C. 1982); Jones v. United States, App. D.C., 441 A.2d 1004 (1982); Hines v. United States, App. D.C., 442 A.2d 146 (1982); Williamson v. United States, App. D.C., 445 A.2d 975 (1982); United States v. McCarthy, App. D.C., 448 A.2d 267 (1982); Watts v. United States, App. D.C., 449 A.2d 308 (1982); Dobson v. United States, App. D.C., 449 A.2d 1082 (1982), cert. denied, 464 U.S. 831, 104 S. Ct. 109, 78 L. Ed. 2d 111 (1983); United States v. Jackson, App. D.C., 450 A.2d 419 (1982); Taylor v. United States, App. D.C., 451 A.2d 859 (1982), cert. denied, 461 U.S. 936, 103 S. Ct. 2105, 77 L. Ed. 2d 311 (1983); United States v. Washington, 110 WLR 617 (Super. Ct. 1982); United States v. Blackwell, 694 F.2d 1325 (D.C. Cir. 1982); United States v. Glover, 555 F. Supp. 604 (D.D.C. 1982), aff'd, 725 F.2d 120 (D.C. Cir.), cert. denied, 466 U.S. 905, 104 S. Ct. 1682, 80 L. Ed. 2d 157 (1984); United States v. Bright, 563 F. Supp. 354 (D.D.C. 1982), aff'd sub nom. United States v. Moore, 732 F.2d 983 (D.C. Cir. 1984); Howard v. United States, App. D.C., 452 A.2d 966 (1982), cert. denied, 460 U.S. 1087, 103 S. Ct. 1782, 76 L. Ed. 2d 352 (1983); Reed v. United States, App. D.C., 452 A.2d 1173 (1982), cert. denied, 464 U.S. 839, 104 S. Ct. 132, 78 L. Ed. 2d 127 (1983); Jones v. United States, App. D.C., 452 A.2d 1185 (1982); Benjamin v. United States, App. D.C., 453 A.2d 810 (1982); Hall v. United States, App. D.C., 454 A.2d 314 (1982); Powell v. United States, App. D.C., 455 A.2d 405 (1982); Brooks v. United States, App. D.C., 458 A.2d 66 (1983); United States v. Covington, App. D.C., 459 A.2d 1067 (1983); Hawkins v. United States, App. D.C., 461 A.2d 1025 (1983), cert. denied, 464 U.S. 1052, 104 S. Ct. 734, 79 L. Ed. 2d 193 (1984); Washington v. United States, App. D.C., 461 A.2d 1037 (1983); Beale v. United States, App. D.C., 465 A.2d 796 (1983), cert. denied, 465 U.S. 1030, 104 S. Ct. 1293, 79 L. Ed. 2d 694 (1984); Adams v. United States, App. D.C., 466 A.2d 439 (1983); Welch v. United States, App. D.C., 466 A.2d 829 (1983); Reese v. United States,

App. D.C., 467 A.2d 152 (1983); United States v. Short, 111 WLR 81 (Super. Ct. 1983); United States v. Patterson, 111 WLR 73 (Super. Ct. 1983); Willingham v. United States, App. D.C., 467 A.2d 742 (1983); Johnson v. United States, App. D.C., 468 A.2d 1325 (1983), modified on rehearing, App. D.C., 496 A.2d 592 (1985); Moore v. United States, App. D.C., 468 A.2d 1342 (1983); Morris v. United States, App. D.C., 469 A.2d 432 (1983); Smith v. United States, App. D.C., 470 A.2d 315 (1983), cert. denied, 469 U.S. 1218, 105 S. Ct. 1201, 84 L. Ed. 2d 344 (1985); Sherer v. United States, App. D.C., 470 A.2d 732 (1983), cert. denied, 469 U.S. 931, 105 S. Ct. 325, 83 L. Ed. 2d 262 (1984); Bedney v. United States, App. D.C., 471 A.2d 1022 (1984); Wood v. United States, App. D.C., 472 A.2d 408 (1984); Fersner v. United States, App. D.C., 482 A.2d 387 (1984); Davis v. United States, App. D.C., 482 A.2d 783 (1984); Rogers v. United States, App. D.C., 483 A.2d 277 (1984), cert. denied, 469 U.S. 1227, 105 S. Ct. 1223, 84 L. Ed. 2d 362 (1985); White v. United States, App. D.C., 484 A.2d 553 (1984); Fields v. United States, App. D.C., 484 A.2d 570 (1984); Douglas v. United States, App. D.C., 488 A.2d 121 (1985); Jackson v. United States, App. D.C., 490 A.2d 192 (1985); Collins v. United States, App. D.C., 491 A.2d 480 (1985), cert. denied, 475 U.S. 1124, 106 S. Ct. 1646, 90 L. Ed. 2d (1986); Smith v. United States, App. D.C., 491 A.2d 1144 (1985); Jackson v. United States, App. D.C., 498 A.2d 185 (1985); Cox v. United States, App. D.C., 498 A.2d 231 (1985); Washington v. United States, App. D.C., 498 A.2d 247 (1985); Hammill v. United States, App. D.C., 498 A.2d 551 (1985); Washington v. United States, App. D.C., 499 A.2d 95 (1985); Hairston v. United States, App. D.C., 500 A.2d 994 (1985); Hammond v. United States, App. D.C., 501 A.2d 796 (1985); Groves v. United States, App. D.C., 504 A.2d 602 (1986); Robinson v. United States, App. D.C., 506 A.2d 572 (1986); Snipes v. United States, App. D.C., 507 A.2d 159 (1986); Davis v. United States, App. D.C., 509 A.2d 105 (1986); Brame v. Palmer, App. D.C., 510 A.2d 229 (1986); Davis v. United States, App. D.C., 510 A.2d 1051 (1986); Arnold v. United States, App. D.C., 511 A.2d 399 (1986); United States v. Mitchell, 114 WLR 1257 (Super. Ct. 1986); Brown v. United States, App. D.C., 518 A.2d 415 (1986), cert. denied, 485 U.S. 978, 108 S. Ct. 1274, 99 L. Ed. 2d 485 (1988); United States v. Jackson, 824 F.2d 21 (D.C. Cir. 1987), cert. denied, 484 U.S. 1013, 108 S. Ct. 715, 98 L. Ed. 2d 665 (1988); United States v. Mitchell, 699 F. Supp. 1 (D.D.C. 1987); Sanders v. United States, App. D.C., 550 A.2d 343 (1988); Byrd v. United States, App. D.C., 551 A.2d 96 (1988), cert. denied, 493 U.S. 968, 110 S. Ct. 415, 107 L. Ed. 2d 380 (1989); Thomas v. United States, App. D.C., 553 A.2d 1206 (1989); Franklin v. United States, App. D.C., 555 A.2d 1010 (1989);

Thomas v. United States, App. D.C., 557 A.2d 599 (1989); Edelen v. United States, App. D.C., 560 A.2d 527 (1989); Staten v. United States, App. D.C., 562 A.2d 90 (1989); Johnson v. United States, App. D.C., 562 A.2d 603 (1989); Seeney v. United States, App. D.C., 563 A.2d 1081 (1989), cert. denied, 498 U.S. 858, 111 S. Ct. 158, 112 L. Ed. 2d 124 (1990); Davis v. United States, App. D.C., 564 A.2d 31 (1989); United States v. McNeil, 911 F.2d 768 (D.C. Cir. 1990); United States v. Khosravi, 733 F. Supp. 137 (D.D.C. 1990); Bigelow v. Knight, 737 F. Supp. 669 (D.D.C. 1990); Nelson v. United States, App. D.C., 580 A.2d 114 (1990); Rice v. United States, App. D.C., 580 A.2d 119 (1990); United States v. Alston, App. D.C., 580 A.2d 587 (1990); James v. United States, App. D.C., 580 A.2d 636 (1990); Bass v. United States, App. D.C., 580 A.2d 669 (1990); United States v. Barnes, 118 WLR 1709 (Super. Ct. 1990); United States v. Jones, 118 WLR 1837 (Super. Ct. 1990); Green v. United States, App. D.C., 580 A.2d 1325 (1990); Belton v. United States, App. D.C., 581 A.2d 1205 (1990); Harper v. United States, App. D.C., 582 A.2d 485 (1990); Comber v. United States, App. D.C., 584 A.2d 26 (1990); Irby v. United States, App. D.C., 585 A.2d 759 (1991); Coreas v. United States, App. D.C., 585 A.2d 1376, cert. denied, 502 U.S. 855, 112 S. Ct. 167, 116 L. Ed. 2d 130 (1991); Lumpkin v. United States, App. D.C., 586 A.2d 701, cert. denied, 502 U.S. 849, 112 S. Ct. 151, 116 L. Ed. 2d 116 (1991); Key v. United States, App. D.C., 587 A.2d 1072 (1991); Brown v. United States, App. D.C., 589 A.2d 434 (1991); Duhart v. United States, App. D.C., 589 A.2d 895 (1991); Galberth v. United States, App. D.C., 590 A.2d 990 (1991); Mendes v. United States, App. D.C., 595 A.2d 972 (1991), cert. denied, 503 U.S. 977, 112 S. Ct. 1602, 118 L. Ed. 2d 316 (1992); Winters v. Ridley, App. D.C., 596 A.2d 569 (1991); United States v. Hobbs, 119 WLR 673 (Super. Ct. 1991); Johnson v. United States, App. D.C., 596 A.2d 980 (1991), cert. denied, 504 U.S. 927, 112 S. Ct. 1987, 118 L. Ed. 2d 585 (1992); Joseph v. United States, App. D.C., 597 A.2d 14 (1991), cert. denied, 504 U.S. 928, 112 S. Ct. 1988, 118 L. Ed. 2d 585 (1992); Briggs v. United States, App. D.C., 597 A.2d 370 (1991); Peay v. United States, App. D.C., 597 A.2d 1318 (1991); In re D.A., App. D.C., 597 A.2d 1331 (1991); In re Mendes, App. D.C., 598 A.2d 168 (1991); Hazel v. United States, App. D.C., 599 A.2d 38 (1991), cert. denied, 506 U.S. 939, 113 S. Ct. 374, 121 L. Ed. 2d 286 (1992); Burnette v. United States, App. D.C., 600 A.2d 1082 (1991); United States v. Cutchin, 956 F.2d 1216 (D.C. Cir. 1992); Price v. United States, App. D.C., 602 A.2d 641 (1992); Swanson v. United States, App. D.C., 602 A.2d 1102 (1992); Leonard v. United States, App. D.C., 602 A.2d 1112 (1992); Taylor v. United States, App. D.C., 603 A.2d 451, cert. denied, 506 U.S. 852, 113 S.

Ct. 155, 121 L. Ed. 2d 105 (1992); Allen v. United States, App. D.C., 603 A.2d 1219, cert. denied, 505 U.S. 1227, 112 S. Ct. 3050, 120 L. Ed. 2d 916 (1992); Samuels v. United States, App. D.C., 605 A.2d 596 (1992); Bostick v. United States, App. D.C., 605 A.2d 916 (1992); Martin v. United States, App. D.C., 606 A.2d 120 (1991); Hunter v. United States, App. D.C., 606 A.2d 139, cert. denied, 506 U.S. 991, 113 S. Ct. 509, 121 L. Ed. 2d 444 (1992); Yelverton v. United States, App. D.C., 606 A.2d 181 (1992); Bean v. United States, App. D.C., 606 A.2d 770 (1992); Williamson v. United States, App. D.C., 607 A.2d 471 (1992), cert. denied, — U.S. —, 114 S. Ct. 96, 126 L. Ed. 2d 63 (1993); Harper v. United States, App. D.C., 608 A.2d 152 (1992); Burgess v. United States, App. D.C., 608 A.2d 733 (1992); Hayward v. United States, App. D.C., 612 A.2d 224 (1992); Bond v. United States, App. D.C., 614 A.2d 892 (1992); Foster v. United States, App. D.C., 615 A.2d 213 (1992); Ford v. United States, App. D.C., 616 A.2d 1245 (1992); United States v. Harris, App. D.C., 617 A.2d 189 (1992); Speaks v. United States, App. D.C., 617 A.2d 942 (1992); Bruce v. United States, App. D.C., 617 A.2d 986 (1992), cert. denied, — U.S. —, 113 S. Ct. 1878, 123 L. Ed. 2d 496 (1993); Cousart v. United States, App. D.C., 618 A.2d 96 (1992), cert. denied, — U.S. —, 113 S. Ct. 1878, 123 L. Ed. 2d 496 (1993); Harris v. United States, App. D.C., 618 A.2d 140 (1992); United States v. Reese, 993 F.2d 254 (D.C. Cir. 1993); King v. United States, App. D.C., 618 A.2d 727 (1993); Edwards v. United States, App. D.C., 619 A.2d 33 (1993); Coleman v. United States, App. D.C., 619 A.2d 40 (1993); United States v. Bellamy, App. D.C., 619 A.2d 515 (1993); Scott v. United States, App. D.C., 619 A.2d 917 (1993); Morris v. United States, App. D.C., 622 A.2d 1116, cert. denied, — U.S. —, 114 S. Ct. 270, 126 L. Ed. 2d 221 (1993); Marshall v. United States, App. D.C., 623 A.2d 551 (1992); Allison v. United States, App. D.C., 623 A.2d 590 (1993); Norman v. United States, App. D.C., 623 A.2d 1165 (1993); Robinson v. United States, App. D.C., 623 A.2d 1234 (1993); Culp v. United States, App. D.C., 624 A.2d 460 (1993); Edelen v. United States, App. D.C., 627 A.2d 968 (1993); Mitchell v. United States, App. D.C., 629 A.2d 10 (1993), cert. denied, — U.S. —, 114 S. Ct. 1119, 127 L. Ed. 2d 429 (1994); United States v. Harris, App. D.C., 629 A.2d 481 (1993); Cowan v. United States, App. D.C., 629 A.2d 496 (1993); Wilkes v. United States, App. D.C., 631 A.2d 880 (1993), cert. denied, — U.S. —, 115 S. Ct. 143, 130 L. Ed. 2d 84 (1994); United States v. Jackson, 121 WLR 849 (Super. Ct. 1993); Clark v. United States, App. D.C., 639 A.2d 76 (1993); United States v. Flynn, 122 WLR 1021 (Super. Ct. 1994); McKinnon v. United States, App. D.C., 644 A.2d 438, cert. denied, — U.S. —, 115 S. Ct. 523, 130 L. Ed. 2d 428 (1994); Carey v. United States, App. D.C.,

647 A.2d 56 (1994); *Martin v. United States*, App. D.C., 647 A.2d 1135 (1994); *Riley v. United States*, App. D.C., 647 A.2d 1165 (1994); *Morris v. United States*, App. D.C., 648 A.2d 958 (1994); *Byers v. United States*, App. D.C., 649 A.2d 279 (1994); *Ulmer v. United States*, App. D.C., 649 A.2d 295 (1994); *Mayfield v. United States*, App. D.C., 659 A.2d 1249 (1995); *Hood v. United States*, App. D.C., 661 A.2d 1081 (1995); *Dade v. United States*, App. D.C., 663 A.2d 547 (1995); *Trice v. United States*, App. D.C., 662 A.2d 891 (1995); *United States v. Holiday, Etc.*, 123 WLR 1957 (Super. Ct. 1995); *In re M.A.M.*, 124 WLR 173 (Super. Ct. 1995); *Lee v. United States*, App. D.C., 668 A.2d 822 (1995); *Harris v. United States*, App. D.C., 668 A.2d 839 (1995).

II. ELEMENTS.

A. In General.

Elements of offense. — In a prosecution for carrying gun without a license, the prosecution is required only to prove that the accused carried the gun and had no license to carry it. *Bussie v. United States*, App. D.C., 81 A.2d 247 (1951).

For a conviction for a violation of this section, it is necessary only to show that the defendant intended to carry the pistol and that the pistol was carried unlicensed in the District. *Brown v. United States*, App. D.C., 379 A.2d 708 (1977).

The offense of carrying a pistol without a license has 3 essential elements: (1) Carrying an operable pistol; (2) without a license; and (3) with intent to do those 2 acts. *Tucker v. United States*, App. D.C., 421 A.2d 32 (1980); *Jackson v. United States*, App. D.C., 395 A.2d 99 (1978).

In order to show a violation of this section, the government must prove beyond a reasonable doubt that the defendant carried either openly or in a concealed manner any deadly or dangerous weapon, that he had the intent to do the acts constituting the carrying of such dangerous weapon, and that the defendant's purpose in carrying the instrument was its use as a dangerous weapon. *In re S.P.*, App. D.C., 465 A.2d 823 (1983).

Conviction of carrying a pistol without a license requires proof of (1) carrying an operable pistol, (2) without a license, and (3) with intent to do those two acts. The defendant must carry the pistol openly or concealed on or about his person. *Butler v. United States*, App. D.C., 614 A.2d 875, cert. denied, 506 U.S. 1009, 113 S. Ct. 625, 121 L. Ed. 2d 558 (1992).

To support a conviction for carrying a pistol without a license in violation of this section, the government must prove beyond a reasonable doubt that the defendant carried an operable pistol on or about his person, was not licensed to carry the pistol, and intended to do the acts which constitute the carrying of a pistol with-

out a license. *Campos v. United States*, App. D.C., 617 A.2d 185 (1992).

Second offense does not arise until continuity of first offense is broken. — The offense of carrying a weapon is continuous and may be committed by a person who is moving from place to place; a second offense does not arise until the continuity of the first act is broken. *Bruce v. United States*, App. D.C., 471 A.2d 1005 (1984).

Continuity of first act of carrying weapon would have been broken if defendant had put down weapon so that there was a break in his carrying proscribed weapon, or if defendant had returned to his dwelling house, place of business, or other land possessed by him where he might lawfully carry the weapon. If he had again taken up the weapon and gone out in public with it, 2 separate offenses would have been committed. *Bruce v. United States*, App. D.C., 471 A.2d 1005 (1984).

It is an offense to carry pistol without a license, whether openly or concealed. *United States v. Waters*, 73 F. Supp. 72 (D.D.C. 1947), appeal dismissed, 335 U.S. 869, 69 S. Ct. 168, 93 L. Ed. 413 (1948).

And no burden of proving ownership, customary use, or intent to use. — In a prosecution for carrying a pistol without a license, the prosecution has no burden of proving that the defendant either owned the pistol, customarily carried it, or was intending to use it. *United States v. Freeman*, 462 F.2d 290 (D.C. Cir. 1972).

And defendant not charged with stealing. — In a prosecution for carrying a pistol without a license, the defendant is not charged with stealing the pistol but only with the possession of it without a license. *Anderson v. United States*, App. D.C., 326 A.2d 807 (1974), cert. denied, 420 U.S. 978, 95 S. Ct. 1405, 43 L. Ed. 2d 659 (1975).

Proof of unlawful purpose not element of offense. — Proof of intent to use a knife for an unlawful purpose is not an element of the offense. *Scott v. United States*, App. D.C., 243 A.2d 54 (1968).

Failure to complete deal involving gun immaterial. — Defendant's action in negotiating sale of a pistol with government informant directly caused the pistol to be carried and possessed in the District of Columbia, resulting in conviction. That the gun deal never came to fruition was immaterial. *Roy v. United States*, App. D.C., 652 A.2d 1098 (1995).

Proof of intent to use a knife to menace or inflict bodily harm is not required. *Leftwitch v. United States*, App. D.C., 251 A.2d 646 (1969).

Proof of intent to use a weapon for an unlawful purpose is not an element of carrying a pistol without a license. *Mitchell v. United States*, App. D.C., 302 A.2d 216 (1973).

This section does not require proof of an

intent to use the weapon for an extrinsic unlawful purpose. *Logan v. United States*, App. D.C., 402 A.2d 822 (1979).

Section does not declare operability to be an element of the offense. *Morrison v. United States*, App. D.C., 417 A.2d 409 (1980).

This section requires a showing of operability. *Townsend v. United States*, App. D.C., 559 A.2d 1319 (1989).

Definition of "pistol" is not element. —

Trial court did not commit plain error where it instructed the jury on each of the essential elements of the offense of carrying a pistol without a license, but where it did not provide the jury with the statutory definition of a pistol, as the statutory definition of the term "pistol" is not an element of the statutory offense that the trial court was required to specifically include as part of the jury instructions. *Curington v. United States*, App. D.C., 621 A.2d 819 (1993).

But operability is an element of the definition of a "pistol" under this section. *Lee v. United States*, App. D.C., 402 A.2d 840 (1979).

And government must prove weapon operable. — When a defendant is charged with carrying a pistol without a license, the government must prove that the weapon was operable. *Anderson v. United States*, App. D.C., 326 A.2d 807 (1974), cert. denied, 420 U.S. 978, 95 S. Ct. 1405, 43 L. Ed. 2d 659 (1975).

Operability inferred from directing pistol in menacing manner. —

Just as it would be reasonable for a robbery victim to assume that a pistol directed at him in a menacing manner is loaded and operable, so too would it be reasonable for the jury to infer from such facts that the gun was operable. *Morrison v. United States*, App. D.C., 417 A.2d 409 (1980).

Section and federal provision on removed serial number not same offense. —

Because this section involves unlicensed carrying, while 18 U.S.C. § 922(k) requires a removed serial number and an interstate nexus, these statutory provisions are not the same offense. *United States v. Dorsey*, 591 F.2d 922 (D.C. Cir. 1978).

Pistol was not operable where it required expert knowledge to diagnose a defect which prevented firing and to determine what was necessary to correct same. *Curtice v. United States*, App. D.C., 488 A.2d 917 (1985).

Imitation firearms are not included within the scope of this section. *Strong v. United States*, App. D.C., 581 A.2d 383 (1990).

Brandishing inoperable air pistol. — Given this section's purpose of protecting the safety of the public, the court could not affirm a conviction in cases where there was no evidence that the defendant planned to harm anyone when brandishing an inoperable air pistol. *Strong v. United States*, App. D.C., 581 A.2d 383 (1990).

Carrying of dangerous weapon and armed robbery not properly joined. —

The gravamen of the offense of armed robbery is that something is taken from a person by force, while the crime of carrying a dangerous weapon is essentially a crime of possession, designed to keep such dangerous items off the street; the basic natures of the offenses are thus dissimilar and could not properly be joined under Super. Ct. Crim. R. 8. *Roper v. United States*, App. D.C., 564 A.2d 726 (1989).

B. Possession.

Burden of proof. — To support a conviction for carrying a pistol without a license, the government bears the burden of proving possession, either actual or constructive. *Brown v. United States*, App. D.C., 546 A.2d 390 (1988).

Possession of gun in a dwelling place. —

The mere possession of a gun in a dwelling place, without more, is not a criminal offense. *Washington v. United States*, App. D.C., 585 A.2d 167 (1991).

Determination as to whether possession continuous or interrupted. —

In cases where possession at any time is prohibited, the court must still consider whether possession was continuous, in which event only 1 offense is properly charged, or whether possession was interrupted and resumed, in which event each resumption of possession would signal the start of a new possessory offense. *Wilson v. United States*, App. D.C., 590 A.2d 1002, cert. denied, 501 U.S. 1257, 111 S. Ct. 2906, 115 L. Ed. 2d 1069 (1991).

Determination of constructive possession. —

A court determines whether the defendant had constructive possession by a two-part analysis; it inquires (1) whether the defendant knew of the presence of the weapon, and (2) whether he had dominion and control over it. *Brown v. United States*, App. D.C., 546 A.2d 390 (1988).

In order for defendant to exercise control over the weapon, the person in actual possession, exercising actual control over the object, must actively relinquish it. *Jefferson v. United States*, App. D.C., 558 A.2d 298, modified on other grounds, App. D.C., 571 A.2d 178 (1989), cert. denied, 493 U.S. 1032, 110 S. Ct. 748, 107 L. Ed. 2d 765 (1990).

An implicit requirement for constructive possession is that the accused have the intent to exercise dominion or control over the object in question. In *re L.A.V.*, App. D.C., 578 A.2d 708 (1990).

The facts presented, when viewed in the light most favorable to the government, were sufficient to establish that appellant had constructive possession of the murder weapon; therefore, his conviction for carrying a pistol without

a license was affirmed. *White v. United States*, App. D.C., 647 A.2d 766 (1994).

Circumstances surrounding possession of weapon which must be considered include, inter alia, the design or construction of the instrument, the conduct of the defendant prior to his arrest, and any physical alteration of the instrument, and the time and place the defendant was found in possession. In *re S.P.*, App. D.C., 465 A.2d 823 (1983).

Evidence of possession or convenient access essential. — To support a conviction for carrying a pistol without a license, the record must show some facts manifesting possession or at least convenient access. *Jackson v. United States*, App. D.C., 395 A.2d 99 (1978).

Defendants can be found to have jointly possessed a weapon. *Porter v. United States*, App. D.C., 282 A.2d 559 (1971).

And where no evidence of possession, conviction reversed. — Where on the facts a jury could not reasonably find that the defendants had jointly possessed the unlicensed pistol, in the absence of evidence that the defendant in question had carried it, his conviction under this section had to be reversed. *Jackson v. United States*, App. D.C., 395 A.2d 99 (1978).

Possession established by independent means. — While the pistol is not introduced into evidence because it was never recovered, this fact does not preclude the establishment of the defendant's possession of the pistol by independent means. *Morrison v. United States*, App. D.C., 417 A.2d 409 (1980).

Direct personal possession of a prohibited weapon is not required for the occupant of an automobile to be convicted of a violation of this section. *Kenhan v. United States*, App. D.C., 263 A.2d 253 (1970).

Where no physical possession, government must prove constructive possession. — Where the weapon was not in the physical possession of the defendant at the time of its discovery, it is incumbent upon the government to prove that he constructively possessed it. *Tucker v. United States*, App. D.C., 421 A.2d 32 (1980).

Government must prove accessibility and knowledge of pistol. — In a prosecution for carrying a pistol without a license, the government must prove that the pistol was conveniently accessible to the defendant and that he knew of its presence. *Johnson v. United States*, App. D.C., 309 A.2d 497 (1973), cert. denied, 416 U.S. 951, 94 S. Ct. 1960, 40 L. Ed. 2d 301 (1974).

To prove constructive possession, evidence must be adduced establishing that the pistol was conveniently accessible to the defendant and that he knew of its presence. *Tucker v. United States*, App. D.C., 421 A.2d 32 (1980).

Fact of constructive possession does not depend upon ownership. *Jones v. United States*, App. D.C., 299 A.2d 538 (1973).

And not necessary to offer direct proof of knowledge of pistol. — In a prosecution for carrying a pistol without a license, it is not necessary that the government offer direct proof of knowledge of the presence of the pistol. *Johnson v. United States*, App. D.C., 309 A.2d 497 (1973), cert. denied, 416 U.S. 951, 94 S. Ct. 1960, 40 L. Ed. 2d 301 (1974).

In proving constructive possession, it is not necessary that the government offer direct proof of the defendant's knowledge of the presence of the pistol; the jury may infer knowledge from circumstantial evidence. *Tucker v. United States*, App. D.C., 421 A.2d 32 (1980).

Constructive possession may be established by either direct or circumstantial evidence. *Logan v. United States*, App. D.C., 489 A.2d 485 (1985); *Brown v. United States*, App. D.C., 546 A.2d 390 (1988).

Knowledge of gun's presence may be inferred from surrounding circumstances; the government need not offer direct evidence of the defendant's knowledge. *Logan v. United States*, App. D.C., 489 A.2d 485 (1985); *Brown v. United States*, App. D.C., 546 A.2d 390 (1988).

Evidence of proximity is sufficient to permit the jury to infer that a defendant had convenient access and thus dominion and control over a gun. *Logan v. United States*, App. D.C., 489 A.2d 485 (1985); *Brown v. United States*, App. D.C., 546 A.2d 390 (1988).

Evidence sufficient to establish that defendant was in constructive possession of gun. *Brown v. United States*, App. D.C., 546 A.2d 390 (1988).

Evidence insufficient to establish constructive possession. — Government presented insufficient evidence for a reasonable juror to infer beyond a reasonable doubt that appellant was familiar with the contents of the car and that he was specifically knowledgeable of the guns that were recovered from underneath the car's rear right seat. Thus, the government has failed to establish that appellant constructively possessed the seized weapons. *Taylor v. United States*, App. D.C., 662 A.2d 1368 (1995).

Conviction sustained though pistol disassembled. — A conviction for carrying a pistol without a license can be sustained when all of the parts of a disassembled pistol are shown to have been conveniently accessible to the defendant, those parts can be quickly and easily reassembled into an operable gun and the defendant was observed holding an object that reasonably appeared to be related to the gun. *Rouse v. United States*, App. D.C., 391 A.2d 790 (1978).

Evidence establishing possession. — Evidence that a taxicab driver did not need to move to obtain his pistol establishes that he had a pistol "about his person." *United States v. Waters*, 73 F. Supp. 72 (D.D.C. 1947), appeal

dismissed, 335 U.S. 869, 69 S. Ct. 168, 93 L. Ed. 413 (1948).

Evidence that the defendant knew that a weapon was present under the seat in a automobile before the police stopped the vehicle and testimony that both officers saw the gun in the defendant's hand supports a finding that the defendant was "carrying" a dangerous weapon. *United States v. James*, 452 F.2d 1375 (D.C. Cir. 1971).

Evidence not establishing possession. — A defendant on a public street, found standing near a gun partially concealed beneath an auto, without more, cannot be deemed to have sufficient knowledge and control of the weapon so as to be criminally responsible for its possession. *Outzs v. United States*, App. D.C., 306 A.2d 664 (1973).

Where it was undisputed that only 1 defendant had carried the weapon during the armed robbery and there was no direct evidence that the other had ever carried or had convenient access to it before, during or after the robbery, conviction under this section was reversed despite strong circumstantial evidence that the unlicensed pistol was in the getaway car in which both defendants were riding, because a contrary ruling would in effect have announced a rule deeming all passengers in a motor vehicle to be carrying a pistol which only one of them has been seen to possess or control. *Jackson v. United States*, App. D.C., 395 A.2d 99 (1978).

No distinction between possession and custody. — For the purpose of demonstrating that a defendant had either actual or constructive possession of an unlicensed pistol, there is no significant legal distinction between possession and custody. *Campos v. United States*, App. D.C., 617 A.2d 185 (1992).

C. Without a License.

Aiding and abetting. — To convict for aiding and abetting, some conduct by an alleged accomplice of an affirmative character in furtherance of the act of carrying a pistol without a license by the principal must be established. *Halicki v. United States*, App. D.C., 614 A.2d 499 (1992).

In order to convict of carrying a pistol without a license on an aiding and abetting theory, the government must show that the principal (not the aider and abettor) was not licensed to carry the pistol. *Halicki v. United States*, App. D.C., 614 A.2d 499 (1992).

"Without a license" part of offense. — The qualifying phrase "without a license" is not to be treated as an exception, but rather as a descriptive part of the offense. *Brown v. United States*, App. D.C., 66 A.2d 491 (1949).

And where government fails to introduce evidence on license, defendant not

guilty. — In view of the government's failure to introduce evidence that the defendant lacked a valid license to carry a pistol, he should not be found guilty of carrying a pistol without a license. *In re W.K.*, App. D.C., 323 A.2d 442 (1974).

Production of official custodian best procedure to prove lack of license. — In a prosecution for carrying a gun without a license, the best procedure to prove that the defendant had no license would be to produce the official custodian of the police records. *Bussie v. United States*, App. D.C., 81 A.2d 247 (1951).

But testimony of policeman sufficient. — In the absence of objection, the testimony of a police officer that he had searched pistol license records is of sufficient probative force to show that the accused had no license, even though the official custodian is not produced. *Bussie v. United States*, App. D.C., 81 A.2d 247 (1951).

Carrying a pistol without a license presupposes an operable and unlicensed pistol outside one's own premises or place of business. *Rouse v. United States*, App. D.C., 402 A.2d 1218 (1979).

Sufficient proof of lack of license. — The government may prove lack of a license by the oral testimony of someone who has searched an entire group of entries and is prepared to report that it does not contain a specific entry. *Hilton v. United States*, App. D.C., 435 A.2d 383 (1981).

D. Intent.

Intent to commit act needed. — Carrying a dangerous weapon without a license is not an offense at common law and all that is needed is an intent to commit the proscribed act. *Cooke v. United States*, 275 F.2d 887 (D.C. Cir. 1960); *Mackey v. United States*, App. D.C., 451 A.2d 887 (1982).

All that is needed to prove carrying a pistol without a license is an intent to do the proscribed act. *Mitchell v. United States*, App. D.C., 302 A.2d 216 (1973).

Specific intent not required. — This section and §§ 6-2311 and 6-2361 are general intent crimes, and no specific intent to use a gun (or ammunition) need be proved in order to obtain a conviction under any of the three statutes; a claim of mistake of law, without more, cannot be relied upon by a defendant charged with a general intent crime. *Bsharah v. United States*, App. D.C., 646 A.2d 993 (1994).

The government is not required to show a defendant's specific intent to use the instrument unlawfully. *In re S.P.*, App. D.C., 465 A.2d 823 (1983).

Common law intent inapplicable. — Carrying a pistol without a license is a crime unknown to the common law, and therefore, the

common law criminal intent element does not apply. *McMillen v. United States*, App. D.C., 407 A.2d 603 (1979).

Use of imitation firearm to frighten. — A person who uses an imitation firearm to frighten others would not be subject to prosecution, unless he attempted to coerce those people to cooperate in some other criminal act. *Strong v. United States*, App. D.C., 581 A.2d 383 (1990).

Defendant's intent in carrying weapon was for use as dangerous weapon. — This section does not limit the scope of the offense to cases where the appellant's intent relates to the instant use of the weapon. *Monroe v. United States*, App. D.C., 598 A.2d 439 (1991).

Defendant was found in violation of this section, where the design of the knife (over 10 inches long with a blade over 6 inches), the time, place, and conduct of defendant in bringing the knife into a government office, defendant's failure to state to the officers any other purpose for carrying the weapon but its use as a weapon, and evidence that defendant knew how and was prepared to use the knife as a weapon, all combined to justify the conclusion that appellant's intent in carrying the knife was for use as a dangerous weapon. *Monroe v. United States*, App. D.C., 598 A.2d 439 (1991).

Although defendant was attempting to check the knife when arrested, his statements permitted the inference that he was prepared to use it, should the occasion arise, both prior to entering and, after retrieving the briefcase, immediately upon leaving the public building. *Monroe v. United States*, App. D.C., 598 A.2d 439 (1991).

E. Deadly or Dangerous Weapon.

"Deadly or dangerous weapon" defined. — A "deadly or dangerous weapon" is one which is likely to produce death or great bodily injury by the use made of it. *Scott v. United States*, App. D.C., 243 A.2d 54 (1968).

An inoperable air pistol did not constitute a "dangerous weapon" for purposes of this section; the pistol was not inherently dangerous, and the defendant did not use it in a manner which rendered it so as he at no time brandished the pistol, although he testified that he carried the pistol in order to frighten potential attackers, and he could not cause "death or great bodily injury" by firing it at anyone, as it was inoperable. *Strong v. United States*, App. D.C., 581 A.2d 383 (1990).

Knife as "deadly or dangerous weapon." — Historically, the Court of Appeals has determined which knives constituted "deadly or dangerous weapons capable of being so concealed" described in this section, by focusing upon the intent of the person carrying the knife, as well as upon the design or construction of the knife

carried. *Mihav v. United States*, App. D.C., 618 A.2d 197 (1992).

Definition of pistol. — An air pistol, even if operable, does not constitute a "pistol" for purposes of this section and § 22-3201(a). *Strong v. United States*, App. D.C., 581 A.2d 383 (1990).

Instrument may be dangerous in design or purpose. — An instrument may be dangerous in its ordinary use as contemplated by its design and construction, or where the purpose of carrying the object, under the circumstances, is its use as a weapon. *Scott v. United States*, App. D.C., 243 A.2d 54 (1968).

Under certain circumstances a hawk-bill knife can be a "dangerous weapon." *Perry v. United States*, App. D.C., 230 A.2d 721 (1967); *Best v. United States*, App. D.C., 237 A.2d 825 (1968).

As can long knife. — A knife 10 inches long when extended, with its blade slightly more than 4 inches from the shank to the tip, is a deadly weapon. *Scott v. United States*, App. D.C., 243 A.2d 54 (1968).

Test of dangerousness. — The test as to whether a defendant with a knife was carrying a deadly or dangerous weapon is whether the purpose of carrying it was its use as a weapon. *Leftwich v. United States*, App. D.C., 251 A.2d 646 (1969).

The test of whether the object being carried by an accused is a dangerous weapon is whether the purpose of carrying the object, under the circumstances, is its use as a weapon. *Clarke v. United States*, App. D.C., 256 A.2d 782 (1969).

The test to be applied in determining whether a kitchen knife is a "deadly dangerous weapon" is whether, under the circumstances, the purpose of carrying the knife is its use as a weapon. *Nelson v. United States*, App. D.C., 280 A.2d 531 (1971).

Section does not prohibit the carrying of knives for a legitimate purpose. *Scott v. United States*, App. D.C., 243 A.2d 54 (1968).

Pistol under this section is a firearm. *Lee v. United States*, App. D.C., 402 A.2d 840 (1979).

F. Crime of Violence.

"Crime of violence" includes assault on a police officer with a deadly weapon. — The offense of assault on a police officer with a dangerous weapon can be a predicate offense for conviction of possession of a firearm while committing a crime of violence, because assault on a police officer with a dangerous weapon is not listed as a crime of violence in § 22-3201(f). *Parks v. United States*, App. D.C., 627 A.2d 1 (1993).

III. ARREST; SEARCH AND SEIZURE.

Special police officer appointed under § 4-115 (see now § 4-114) has the authority

to arrest the defendant for carrying a concealed weapon. *United States v. Dorsey*, 449 F.2d 1104 (D.C. Cir. 1971).

Prearrest delay must not be deliberate effort to gain advantage. — A delay in arresting the defendant must not be the product of any deliberate effort by the police to gain an advantage. *United States v. Parish*, 468 F.2d 1129 (D.C. Cir. 1972), cert. denied, 410 U.S. 957, 93 S. Ct. 1430, 35 L. Ed. 2d 690 (1973).

Police may ask suspiciously acting defendant for identification. — Where the defendant is acting in a suspicious manner outside a store, police officers act reasonably in asking him for identification. *United States v. Lee*, App. D.C., 271 A.2d 566 (1970).

And entitled to conduct limited search for protection. — Where the police have reason to fear that the defendant is carrying a firearm on his person, they are entitled for their own protection to conduct a limited search for weapons. *Lawson v. United States*, App. D.C., 360 A.2d 38 (1976); *In re D.E.W.*, App. D.C., 612 A.2d 194 (1992).

But where no belief of weapon or crime, stop unreasonable. — Where a police officer does not have reason to believe that the defendant is possessed of a weapon or that a crime has been committed or in the process of commission, a stop and frisk and seizure of a pistol is not reasonable. *Kenion v. United States*, App. D.C., 302 A.2d 723 (1973).

Police are not required to await some conduct of suspect which would confirm their suspicion that he is in possession of a gun. Peremptory conduct by the police where a gun is involved is justified. *Henighan v. United States*, App. D.C., 433 A.2d 1059 (1981).

Police authorized in stopping suspicious acting automobile. — Police officers are authorized in stopping a suspicious acting automobile and detaining the automobile and its occupants for brief questioning. *Young v. United States*, 435 F.2d 405 (1970).

Lawful for police to ask defendant's companions to exit vehicle. — It is unlawful for police officers to ask the defendant's companion to come out of a vehicle incident to a search. *Neal v. United States*, App. D.C., 260 A.2d 89 (1969).

And, where told of gun, to seize and arrest defendant. — Where the passenger-owner of an automobile tells a police officer that the driver has a gun, the officer has constitutional justification for seizing the gun and arresting the defendant for carrying a pistol without a license. *Poteat v. United States*, App. D.C., 330 A.2d 229 (1974).

Probable cause. — Where prior to the forcible entry and discovery of the gun, the officers did not know whether the gun was lawfully owned and registered, there was no probable cause to believe that the defendant had com-

mitted any crime. *Washington v. United States*, App. D.C., 585 A.2d 167 (1991).

Probable cause justifies warrantless arrest. — Probable cause to believe that a house-breaking has been committed and that the defendant is the offender justifies an arrest without a warrant. *Paris v. United States*, 321 F.2d 378 (D.C. Cir. 1963).

An arrest without a warrant for carrying a dangerous or deadly weapon may be made on probable cause. *Lee v. United States*, App. D.C., 242 A.2d 212 (1968).

And police not privileged to ignore facts of offense. — A police officer is not privileged to ignore facts which would give him reasonable cause to believe that a person is carrying a dangerous or deadly weapon. *Lee v. United States*, App. D.C., 242 A.2d 212 (1968).

Probable cause arising from eyewitness tip and police observation. — Police may have probable cause to believe that an individual is in unlawful possession of a gun because a tip about such possession, probably from a citizen-eyewitness reporting a person at large with a gun, is contemporaneously confirmed by police observation of details provided in the tip. *Henighan v. United States*, App. D.C., 433 A.2d 1059 (1981).

Exact knowledge of weapon's character not required for probable cause. — Probable cause to justify an arrest for carrying a dangerous weapon does not require exact knowledge of the character of the weapon. *Scott v. United States*, App. D.C., 243 A.2d 54 (1968).

Evidence establishing probable cause. — Evidence that police officers saw a gun handle sticking out of the defendant's pocket establishes probable cause to believe that the defendant was carrying a dangerous weapon. *United States v. Jenkins*, 276 F. Supp. 958 (D.D.C. 1967).

Lawful search and seizure incident to arrest. — Where there is probable cause for a reasonably prudent officer to arrest the defendant for unauthorized use of a vehicle, a subsequent search of the vehicle and the defendant's person, with a consequent discovery of a pistol, is lawful. *Williams v. United States*, App. D.C., 304 A.2d 287 (1973).

Police officers, after properly stopping a car and frisking a passenger who is found to be carrying a loaded pistol, have probable cause to infer that some joint criminal enterprise is planned and to make a warrantless search of the car, resulting in the discovery of another revolver. *Jeffreys v. United States*, App. D.C., 312 A.2d 308 (1973).

Following probable cause to arrest, an ensuing search of the defendant which uncovers a pistol is valid as incidental to the arrest. *Hardy v. United States*, App. D.C., 316 A.2d 867 (1974).

Where police officers arrest the defendant

pursuant to a warrant, the seizure of a pistol in an area in which the defendant might gain possession of it, is lawful. *Pinkney v. United States*, App. D.C., 360 A.2d 35 (1976).

Where a police officer has probable cause to arrest the defendant for driving without an operator's permit, he is justified in examining under the driver's seat of the vehicle to look for weapons. *Punch v. United States*, App. D.C., 377 A.2d 1353 (1977), cert. denied, 435 U.S. 955, 98 S. Ct. 1586, 55 L. Ed. 2d 806 (1978).

Where police officers had probable cause to believe that defendant had committed a crime involving a gun, the officers could constitutionally search the interior of defendant's car, including the glove compartment, without a warrant, for the search was a contemporaneous incident of a lawful custodial arrest. *Smith v. United States*, App. D.C., 435 A.2d 1066 (1981), cert. denied, 455 U.S. 950, 102 S. Ct. 1454, 71 L. Ed. 2d 665 (1982).

Pistol discovered in the course of a legal search is admissible in a prosecution of carrying a pistol. *Teresi v. United States*, App. D.C., 187 A.2d 492 (1963).

Defendant must provide evidence of privacy interest in article searched and seized. — The mere fact that the police searched and seized a briefcase does not establish that the police thereby infringed defendant's Fourth Amendment rights. Defendant must provide evidence that he had a protectable privacy interest in the briefcase. *Austin v. United States*, App. D.C., 433 A.2d 1081 (1981).

Government not required to make fingerprint tests. — There is no requirement that imposes on the government the affirmative duty to make paraffin or fingerprint tests in regard to the pistol involved in a prosecution for carrying a pistol without a license. *Williams v. United States*, App. D.C., 237 A.2d 539 (1968).

And failure to perform constitutional. — The government's failure to perform a fingerprint analysis on the pistol found in the defendant's automobile does not deny the defendant due process where the defendant never seeks to introduce the matter at trial and does not seek to have the government perform a fingerprint analysis or attempt to obtain such an analysis himself. *United States v. Henson*, 486 F.2d 1292 (D.C. Cir. 1973).

Arrest must not be a mere sham to search the defendant's automobile. *Rippy v. United States*, App. D.C., 322 A.2d 276 (1974).

Intrusion limited to examination of the very object of hazardous concern is reasonable under the Fourth Amendment. *Crowder v. United States*, App. D.C., 379 A.2d 1183 (1977).

Suitcase in defendant's immediate area afforded protection. — A suitcase containing

a shoulder holster in the immediate area of the premises used by the defendant cannot be carved out of the Fourth Amendment protection afforded the defendant. *Ward v. United States*, App. D.C., 365 A.2d 378 (1976).

Observation of gun in plain view not search or seizure. — Where, after an arrest, a police officer observes a gun in plain view, there is no search or unlawful seizure. *Rippy v. United States*, App. D.C., 322 A.2d 276 (1974).

Seizure of pistol may be within "plain view" exception to search warrant requirement. *Campbell v. United States*, App. D.C., 174 A.2d 87 (1961); *Palmore v. United States*, App. D.C., 290 A.2d 573 (1972), aff'd, 411 U.S. 389, 93 S. Ct. 1670, 36 L. Ed. 2d 342 (1973); *Payne v. United States*, App. D.C., 292 A.2d 800 (1972).

Where the police arrest the defendant for failure to have a driver's permit in his possession, seizing a pistol that is in plain view in the automobile is proper. *Banks v. United States*, App. D.C., 287 A.2d 85 (1972).

An officer who has probable cause to arrest an automobile's occupants has the right to seize a gun in plain view in the automobile. *Hughes v. United States*, App. D.C., 363 A.2d 284 (1976).

Where police officer had probable cause to justify his warrantless entry of the car, his subsequent seizure of a gun found in plain view was proper. *Price v. United States*, App. D.C., 429 A.2d 514 (1981).

And weapon properly seized is admissible. — A revolver which is in plain sight when police officers make an arrest is admissible. *Lucas v. United States*, App. D.C., 256 A.2d 574 (1969).

A pistol in plain view during a police officer's investigation is subject to seizure and can be introduced into evidence. *Hemsley v. United States*, App. D.C., 353 A.2d 14 (1976).

Request for identification not seizure. — Unless there is some element of duress in the encounter, either by force or by a show of authority, a request for identification, without more, cannot be regarded as a seizure within the meaning of the Fourth Amendment. *Purce v. United States*, App. D.C., 482 A.2d 772 (1984).

Exigent circumstances may exist for a warrantless search of an automobile. *United States v. Wilkerson*, App. D.C., 338 A.2d 441 (1975).

Impoundment of parked automobile not authorized. — The impounding of an automobile which a motorist parks in front of the police station after being ordered to follow police officers to the police precinct is not authorized. *Williams v. United States*, App. D.C., 170 A.2d 233 (1961).

Search not invalidated by release of arrestee and issuance of summons. — The

fact that police officers release the arrestee because of a potential explosive situation and later issue a summons neither vitiates the initial arrest nor invalidates the search incident thereto. *United States v. Honesty*, 459 F.2d 1279 (D.C. Cir. 1971).

Refusing defendant's inquiry into police procedure on spot checks not error. — The refusal to permit a defendant who is arrested after guns were found in his vehicle to inquire as to the nature of the police procedure followed in cases of routine spot checks is not error. *Garris v. United States*, App. D.C., 295 A.2d 510 (1972).

Defendant disposing of weapon lacks standing to move to suppress. — A defendant who removed a revolver from his coat pocket and tossed it into the street lacks standing to make a motion to suppress the weapon as evidence. *Smith v. United States*, App. D.C., 292 A.2d 150 (1972).

Failure to entertain frivolous motion to suppress is harmless error. — Where a motion to suppress is frivolous, failure to entertain it in a prosecution for carrying a pistol without a license is harmless error. *Shellie v. United States*, App. D.C., 277 A.2d 288 (1971).

Where the defendant's acts are too innocuous to warrant a temporary seizure for questioning and where a stop is not based on an articulable suspicious of criminal behavior as justified as part of a systematic, the random program of traffic stops, the defendant is entitled to the suppression of a revolver found in a search of his vehicle incident to his arrest on an outstanding traffic warrant. *United States v. Montgomery*, 561 F.2d 875 (D.C. Cir. 1977).

But search not illegal where defendant not arrested until gun observed. — Refusing to suppress evidence relating to a weapon seized on the ground that it was obtained as a result of an unlawful search and seizure is not error where the defendant was not arrested until an officer observed the gun in the defendant's hand. *Contee v. United States*, App. D.C., 212 A.2d 342 (1965).

In prosecution for violating section, Fifth Amendment applies to questioning concerning defendant's address. *Brewster v. United States*, App. D.C., 271 A.2d 409 (1970).

Defendant given form containing Miranda warnings to read sufficiently informed. — In a prosecution for carrying a pistol without a license, a defendant to whom Miranda warnings are read from a standard police form and who is given the form to read before being questioned, but who is not asked if he understands the contents, has been sufficiently informed of his right to remain silent and to counsel. *Brewster v. United States*, App. D.C., 271 A.2d 409 (1970).

Failure to advise arrestee of constitutional rights harmless, absent introduction of statements. — The failure to show that the defendant was advised of his constitutional rights at the time of his arrest does not entitle him to a reversal of his conviction for carrying a deadly weapon, absent the introduction of any statements made by him. *Best v. United States*, App. D.C., 237 A.2d 825 (1968).

IV. PROCEDURE.

A. In General.

Joinder of connected offenses proper. — Where numerous offenses, including carrying a dangerous weapon, are based on 2 or more connected acts constituting part of a common scheme and plan, the defendants participated in the acts, and each defendant aided and abetted the offenses charged against the other defendants, it is proper to join the defendants and the offenses in the indictment. *United States v. Wilson*, 434 F.2d 494 (D.C. Cir. 1970).

The joinder of counts charging assault with a dangerous weapon and possession of a pistol without a license is proper where each count is directed to a different facet of a single continuous occurrence. *Barker v. United States*, App. D.C., 373 A.2d 1215 (1977).

Concealed weapon prosecution cannot be combined with registration prosecution. — Prosecutions for carrying a pistol without a license, and failing to register the same pistol cannot be combined in 1 proceeding. *United States v. Wilder*, 463 F.2d 1263 (D.C. Cir. 1972).

Defendant not put in double jeopardy by assault and concealed weapons prosecutions. — The defendant is not put twice in jeopardy for the same offense by a prosecution for assault with a deadly weapon and carrying a concealed unlicensed weapon. *Kendrick v. United States*, 238 F.2d 34 (D.C. Cir. 1956).

Prior conviction is neither element of offense nor necessary to double jeopardy protection. — *Punch v. United States*, App. D.C., 377 A.2d 1353 (1977), cert. denied, 435 U.S. 955, 98 S. Ct. 1586, 55 L. Ed. 2d 806 (1978).

Concurrent adjudication of concealed weapon and unregistered firearm charges constitutional. — A defendant who is simultaneously tried by a jury on a charge of carrying a pistol without a license and by the judge on charges of possessing an unregistered firearm and possessing ammunition therefor is not deprived of his due process rights by the very nature of the concurrent adjudication of all the charges against him. *Copening v. United States*, App. D.C., 353 A.2d 305 (1976).

Defendants joined by filing indictment and moving for joinder. — The joinder of defendants, one charged with a misdemeanor

and the other with a felony in connection with carrying a deadly weapon, can be accomplished by filing an information against the former and, upon the indictment of his codefendant, moving for joinder. *Freeman v. Smith*, App. D.C., 301 A.2d 217 (1973).

Speedy trial right not denied where defendant at large and suffers no prejudice. — The right to a speedy trial of a defendant charged with carrying a pistol without a license is not impinged where the defendant is still at large, the police are doing their best to locate him, the defendant does not press a speedy trial right, and where the defendant suffers no prejudice to his defense. *United States v. Parish*, 468 F.2d 1129 (D.C. Cir. 1972), cert. denied, 410 U.S. 957, 93 S. Ct. 1430, 35 L. Ed. 2d 690 (1973).

There is no absolute right to plea bargain. *Smith v. United States*, App. D.C., 356 A.2d 650 (1976).

Adequate representation not denied by failure to call possibly unhelpful witness. — The failure, in a prosecution for carrying a pistol without a license, to call a witness for purposes of establishing ownership does not deprive the defendant of his constitutional right to adequate representation where, at a previous trial for the same offense, it was suggested to counsel that the witness might claim his Fifth Amendment privilege. *Terrell v. United States*, App. D.C., 294 A.2d 860 (1972), cert. denied, 410 U.S. 938, 93 S. Ct. 1398, 35 L. Ed. 2d 603 (1973).

Continuance on publicity ground deniable in view of jury examination and instructions. — In view of an examination of prospective jurors and instructions to the jurors, the court does not abuse discretion in denying a continuance of a prosecution under this section on the ground of publicity regarding gun control, assassination, and other events concomitant with the trial. *United States v. Clemons*, 440 F.2d 205 (D.C. Cir. 1970), cert. denied, 401 U.S. 945, 91 S. Ct. 959, 28 L. Ed. 2d 227 (1971).

Burden of proceeding remains with prosecution once "carrying" case established. — The burden of proceeding does not shift to the defendant once the prima facie case of carrying the weapon has been established but remains with the prosecution. *Brown v. United States*, App. D.C., 66 A.2d 491 (1949).

Inconsistent jury verdicts permitted. — Where jury acquitted defendant of carrying a pistol without a license, it did not necessarily find him not guilty as a principal in the first degree (shooting) murder since inconsistent jury verdicts are permissible. *Miller v. United States*, App. D.C., 479 A.2d 862 (1984).

The offenses of carrying a pistol without a license and possession of a firearm dur-

ing a crime of violence do not merge. *Ray v. United States*, App. D.C., 620 A.2d 860 (1993).

First degree burglary while armed count did not merge with carrying a pistol without a license count under subsection (a). First degree burglary while armed (§§ 22-1801, 22-3202) requires proof that the defendant entered a dwelling of another person — when a person was present in the dwelling — while armed or having readily available a firearm or any other dangerous weapon, but the weapon need not be an operable and unlicensed pistol. *Hanna v. United States*, 666 A.2d 845 (D.C. App. 1995).

B. Indictment.

Pendency of indictment no prohibition against another indictment. — The pendency of a grand jury indictment charging assault with a dangerous weapon does not prohibit another grand jury from considering and returning an indictment charging not only the same count of assault with a dangerous weapon but the additional count of carrying a dangerous weapon. *United States v. Johnson*, App. D.C., 328 A.2d 769 (1974).

Indictment tracing language of section valid. — When an indictment carefully traces the language of this section in indicting a defendant for carrying a dangerous weapon without a license, the indictment is valid. *United States v. Bridges*, 432 F.2d 692 (D.C. Cir. 1970).

And must charge pistol carried without license. — An indictment failing to charge that a pistol was carried without a license fails to charge an offense. *United States v. Waters*, 73 F. Supp. 72 (D.D.C. 1947), appeal dismissed, 335 U.S. 369, 69 S. Ct. 168, 93 L. Ed. 413 (1948).

Indictment may charge defendant with having carried pistol "openly and concealed" about person, rather than "openly or concealed." *Kendrick v. United States*, 238 F.2d 34 (D.C. Cir. 1956); *United States v. Clemons*, 440 F.2d 205 (D.C. Cir. 1970), cert. denied, 401 U.S. 945, 91 S. Ct. 959, 28 L. Ed. 2d 227 (1971).

But operability is not required to be specified in an indictment because to be a "pistol," within the meaning of this section, a firearm must be operable. *Lee v. United States*, App. D.C., 402 A.2d 840 (1979).

Second charge for possession of prohibited weapon not barred by double jeopardy. — Where the trial judge found that the defendant took possession of a shotgun on 2 separate occasions, the decision to charge him with possession of a prohibited weapon with regard to the first occasion was not barred by double jeopardy as a result of his guilty plea in connection with the second occasion. *Wilson v. United States*, App. D.C., 590 A.2d 1002, cert.

denied, 501 U.S. 1257, 111 S. Ct. 2906, 115 L. Ed. 2d 1069 (1991).

Conjunctive charge valid despite failure to prove one of two allegations. — Where the third count of an indictment charged appellant with the commission of a single offense — possession of a firearm while committing a crime of violence — alleging two means by which appellant committed that offense, i.e., possession while committing an armed burglary and possession while committing an assault with a dangerous weapon, and where there was a failure of proof as to the first of those allegations at trial, i.e., while committing an armed burglary, and where furthermore, as a result, the trial court granted a motion for judgment of acquittal as to that portion of that count of the indictment, because the remainder of that count contained a sufficient basis for a finding of possession of a firearm while committing a crime of violence (i.e., an assault with a dangerous weapon), the trial court properly permitted the surviving portion of that count to be considered by the jury. *Farmer v. United States*, App. D.C., 616 A.2d 1241 (1992), cert. denied, — U.S. —, 113 S. Ct. 1958, 123 L. Ed. 2d 661 (1993).

C. Defenses.

1. In General.

Premise for recognizing an exception to this section is that a defendant's actions did not contravene the section, but instead were motivated by an intent to aid and enhance social policy underlying law enforcement. *Logan v. United States*, App. D.C., 402 A.2d 822 (1979).

Immunity under § 6-2375 would not afford protection to a defendant also charged under this section and § 22-3214. *Stein v. United States*, App. D.C., 532 A.2d 641 (1987), cert. denied, 485 U.S. 1010, 108 S. Ct. 1477, 99 L. Ed. 2d 705 (1988).

Federal Firearms Owners' Protection Act. — Trial judge erred by declining to instruct the jury with respect to the federal Firearms Owners' Protection Act (FOPA), 18 U.S.C. § 921 et seq., on which defendant based a part of his theory of the case, and by precluding defendant from presenting a defense based on the FOPA. *Bieder v. United States*, App. D.C., 662 A.2d 185 (1995).

Corrections officer is not prohibited from carrying a pistol, whether or not "on duty." *United States v. Pritchett*, 470 F.2d 455 (D.C. Cir. 1972).

But person not "special policeman" when off duty. — A defendant although in uniform, who is not due to report for duty as a special policeman and is not traveling without deviation, immediately before or immediately after actual duty, between the area where he

worked and his residence, is not a "policeman" nor "law enforcement officer." *Franklin v. United States*, App. D.C., 271 A.2d 784 (1970), aff'd, 458 F.2d 861 (D.C. Cir. 1972).

And special policeman cannot exercise authority outside area he is appointed to protect, or carry weapons away from such an area, with certain exceptions. *Franklin v. United States*, 458 F.2d 861 (D.C. Cir. 1972).

Defendant may claim innocent possession. *Carey v. United States*, App. D.C., 377 A.2d 40 (1977).

Under certain circumstances, the defense of innocent or momentary possession might be applicable to violations of this section, but ordinarily the purpose of the defendant's possession of the weapon is irrelevant. *Worthy v. United States*, App. D.C., 420 A.2d 1216 (1980).

Elements of defense of innocent or momentary possession. — In order to assert the defense of innocent or momentary possession to a charge of carrying a pistol without a license, the accused must show not only an absence of a criminal purpose, but also that his possession was excused and justified as stemming from an affirmative effort to aid and enhance the social policy underlying law enforcement. *Hines v. United States*, App. D.C., 326 A.2d 247 (1974).

A defendant must show more than mere innocent possession in order to claim the defense of innocent or momentary possession; rather, he must prove that there was an innocent possession with the intent of ensuring that the newly found weapon would be taken as soon and as directly as possible to law enforcement officers. *Worthy v. United States*, App. D.C., 420 A.2d 1216 (1980).

Possession for duration of exigency. — The possession of an unlicensed pistol could be considered to be innocent only for the duration of the exigency dictating that a reasonable course of action is to possess a weapon momentarily. *Logan v. United States*, App. D.C. 402 A.2d 822 (1979).

Defendant has right to carry revolver from place of purchase to his home. *Bell v. United States*, 265 F. 1007 (D.C. Cir. 1920).

But holding pistol for friend no defense. — Where the defendant claims he was holding a pistol for a friend, the prosecution need not prove that possession was not temporary and innocent. *United States v. Freeman*, 462 F.2d 290 (D.C. Cir. 1972).

Nor is showing pistol to friend. — Showing a newfound pistol to a friend does not amount to an innocent or momentary possession such as would be a defense to a charge of carrying a pistol without a license. *Hines v. United States*, App. D.C., 326 A.2d 247 (1974).

"Momentary possession" defense extended to § 22-3214(a) prosecutions. — The judicial exception to this section, that under

certain circumstances the defense of innocent or momentary possession might be applicable, is extended to prosecutions under § 22-3214(a). *Worthy v. United States*, App. D.C., 420 A.2d 1216 (1980).

One exception to this section which has been recognized is possession for self-defense. *Logan v. United States*, App. D.C., 402 A.2d 822 (1979); *McBride v. United States*, App. D.C., 441 A.2d 644 (1982).

In prosecution for carrying a dangerous weapon, defendant may raise theory of self-defense. *United States v. James*, 452 F.2d 1375 (D.C. Cir. 1971).

Defendant may be justified in using a weapon in self-defense. *Wilson v. United States*, 198 F.2d 299 (D.C. Cir. 1952).

And mere holding of a loaded pistol does not make a man guilty if the theory of the defense shows that the defendant did not get the gun except in self-defense. *United States v. Freeman*, 462 F.2d 290 (D.C. Cir. 1972).

Where self-defense critical issue, defendant entitled to put on witness without prosecutorial interference. — Where the critical issue in a homicide prosecution is self-defense, the defendant is entitled to have a witness put on the stand without any interference or intimidation by the prosecutor. *United States v. Smith*, 478 F.2d 976 (D.C. Cir. 1973).

Defendant cannot claim self-defense to justify possession of weapon before its use in self-defense. *Johnson v. United States*, App. D.C., 452 A.2d 959 (1982).

Defendant may raise an insanity defense in a prosecution for carrying a pistol without a license. *United States v. Simms*, 463 F.2d 1273 (D.C. Cir. 1972).

And mental impairment tied to offense requires exculpation. — Carrying a dangerous weapon may be so proximately tied to mental impairment as to require exculpation. *United States v. Wilson*, 471 F.2d 1072 (D.C. Cir. 1972), cert. denied, 410 U.S. 957, 93 S. Ct. 1431, 35 L. Ed. 2d 691 (1973).

But no acquittal where only evidence of sexual deviation. — A defendant charged with carrying a dangerous weapon without a license is not entitled to a directed verdict of not guilty by reason of insanity where the only evidence of insanity produced is the testimony of a psychiatrist who states that the defendant was a sexual deviate whose sexual impulses were associated with violence and the implements of violence. *United States v. Evans*, 459 F.2d 1134 (D.C. Cir. 1972).

Mental examination and judicial determination upon finding of insanity. — In a prosecution for carrying a dangerous weapon, the defendant is immediately committed for a mental examination on insanity, after which there is another judicial determination as to whether he is suffering from mental illness and

whether he is dangerous to himself and others, and if he is found to be suffering from mental illness but is not dangerous to himself or others he will be released. *United States v. Brown*, 490 F.2d 758 (D.C. Cir. 1973).

Evidence sufficient to prove entrapment. — See *United States v. Borum*, 584 F.2d 424 (D.C. Cir. 1978).

2. Dwelling House or Place of Business.

Exception to this section must be narrowly circumscribed. *Logan v. United States*, App. D.C., 402 A.2d 822 (1979).

"Dwelling house." — Existing judicial precedent requires a possessory interest in a dwelling house before an individual charged with carrying a pistol or some other dangerous weapon is entitled to claim the benefits of the exception in this section. *United States v. Fortune*, 116 WLR 817 (Super. Ct. 1988).

Defendant has burden of bringing himself within the exception to the offense charged. *Williams v. United States*, App. D.C., 237 A.2d 539 (1968).

In a prosecution for carrying a pistol without a license, the defendant has the burden of bringing himself within the exception providing that no person shall carry a pistol without a license except in his dwelling house or place of business or on other land possessed by him. *White v. United States*, App. D.C., 283 A.2d 21 (1971); *Hines v. United States*, App. D.C., 326 A.2d 247 (1974).

But need not be sole owner of premises. — Under the exception to the prohibition of carrying a weapon if the carrying is in a dwelling house or place of business or other land possessed by the defendant, a person need not be a sole, rather than a part, owner of the premises involved. *Roumel v. United States*, App. D.C., 261 A.2d 240 (1970).

Although required to show exclusive control and possession. — For a defendant charged with carrying a pistol without a license to bring himself within the exception provided, he is required to show that he had exclusive control and possession of the premises. *Hines v. United States*, App. D.C., 326 A.2d 247 (1974).

Under this section the exception applies only to a defendant who has a possessory interest in the land on which he is arrested. When dealing with real property, such an interest entails more than the right to be physically present on the property; it encompasses also a right to exclude, both in its general sense and as it has been construed within the meaning of this section. *Fortune v. United States*, App. D.C., 570 A.2d 809 (1990).

Exceptions relate to owner's possessory interest and not ambulatory places. — The "dwelling house, place of business, and other land possessed" exceptions relate to particular

localities appropriated exclusively to the owner to which are linked possessory interest and not to ambulatory places. *Billinger v. United States*, App. D.C., 425 A.2d 1304 (1981).

Possession of a firearm in one's home is not a crime. *Morton v. United States*, 183 F.2d 844 (D.C. Cir. 1950).

But "dwelling house" not entire apartment building. — The words "dwelling house" and "land possessed by him," will not be read to include an entire apartment building. *White v. United States*, App. D.C., 283 A.2d 21 (1971).

And hallway not within exception. — The defendant's possession of an unlicensed pistol in an apartment house hallway on the floor above his own apartment is not within the exception. *White v. United States*, App. D.C., 283 A.2d 21 (1971).

And porch of apartment building not within exception. — A porch which is part of an apartment building in which the defendant and others lived is not within the exception from the pistol licensing requirement. *Hines v. United States*, App. D.C., 326 A.2d 247 (1974).

"Place of business" exception applicable to those having possessory interest. — The "place of business" exception is applicable only to those who have a controlling, proprietary or possessory interest in the business premises in question. *Berkley v. United States*, App. D.C., 370 A.2d 1331 (1977).

"Place of business" exception refers to proprietary or possessory, not merely managerial, interest. *Scott v. United States*, App. D.C., 392 A.2d 4 (1978).

And not to every government employee. — It cannot be assumed that Congress intended to write in an exception permitting every government employee to carry a loaded pistol while working. *Berkley v. United States*, App. D.C., 370 A.2d 1331 (1977).

Nor to person "in charge." — This section, does not expressly or implicitly create an exception allowing a person "in charge" of premises to carry a pistol without a license. *Scott v. United States*, App. D.C., 392 A.2d 4 (1978).

Business operated from van is not within "place of business" exception. — The "place of business" exception is not available to the driver of a van from which a street vendor business is operated. *Billinger v. United States*, App. D.C., 425 A.2d 1304 (1981).

Cab is not the driver's "place of business." *United States v. Waters*, 73 F. Supp. 72 (D.D.C. 1947), appeal dismissed, 335 U.S. 869, 69 S. Ct. 168, 93 L. Ed. 413 (1948).

The place of business exception to the licensing requirement does not apply to taxicabs. *Yirenkyi v. District of Columbia Hackers' License Appeal Bd.*, App. D.C., 520 A.2d 328 (1987).

Nor is blood unit of hospital. — A lab technician in a blood unit of a hospital does not

fall within the "place of business" exception of this section. *Berkley v. United States*, App. D.C. 370 A.2d 1331 (1977).

Where appellant did not set foot outside store while possessing the weapon, his conviction for carrying a pistol without a license was vacated. *Chang Yoon v. United States*, App. D.C., 594 A.2d 1056 (1991), modified on other grounds, App. D.C., 610 A.2d 1388 (1992).

D. Evidence.

Hotel room not within exception. — Where it was held, as a matter of law, that the day-to-day control exercised by hotel management over premises at which guests intended to remain for relatively short periods of time established that any possessory interest appellant may have had in his hotel room was not "exclusive," appellant's possession of a pistol without a license did not fall under the "dwelling house" exception to the offense. *Gaulmon v. United States*, App. D.C., 465 A.2d 847 (1983).

Requirement that prosecutor disclose before trial material evidence favorable to accused is satisfied when defendant is furnished a copy of exculpatory statement and the address and telephone number of the declarant. The government need not obtain and maintain the availability of an exculpatory declarant as well. *Jackson v. United States*, App. D.C., 424 A.2d 40 (1980), cert. denied, 454 U.S. 1127, 102 S. Ct. 979, 71 L. Ed. 2d 116 (1981).

Judge required to take judicial notice of municipal regulation. — In a prosecution for carrying without a license a pistol that was found in the defendant's automobile, the judge is required to take judicial notice of the municipal regulation authorizing the police to move an illegally parked automobile. *Banks v. United States*, App. D.C. 287 A.2d 85 (1972).

Notice can be taken that custody of police records is in Police Chief. *Smith v. United States*, 353 F.2d 838 (D.C. Cir. 1965), cert. denied, 384 U.S. 910, 86 S. Ct. 1350, 16 L. Ed. 2d 362, 384 U.S. 974, 86 S. Ct. 1867, 16 L. Ed. 2d 684 (1966).

Testimony on search of record primary, not hearsay. — In a prosecution for carrying gun without a license, testimony of a policeman that he searched the records of all persons who held licenses to carry pistols and that there was no record that the defendant had a license is primary evidence and not hearsay. *Bussie v. United States*, App. D.C., 81 A.2d 247 (1951).

Government may fail to extend immunity to a witness who allegedly owned pistol found in the possession of the defendant. *Terrell v. United States*, App. D.C., 294 A.2d 860 (1972), cert. denied, 410 U.S. 938, 93 S. Ct. 1398, 35 L. Ed. 2d 603 (1973).

Prosecutor permitted to cross-examine defendant on prior shooting which he de-

nies. — In a prosecution for first degree murder and carrying a pistol without a license in which the defendant testifies on direct examination that he had not shot the victim of a prior shooting incident, the court does not err in permitting the prosecutor to ask the defendant on cross-examination whether he had in fact shot the victim. *Johnson v. United States*, App. D.C., 373 A.2d 596 (1977).

Harmless error to admit statements regarding possession of weapon made prior to Miranda warning. — Where other evidence against defendant was overwhelming, it was harmless error to admit defendant's statements regarding possession of unregistered gun made in response to police officer's questions where defendant was in "custody" but not given his Miranda warnings. *Miley v. United States*, App. D.C., 477 A.2d 720 (1984).

Defense allowed to impeach prosecution's case. — The defense counsel, in a prosecution for assault with a dangerous weapon, should be allowed to impeach the prosecution's case. *Gillespie v. United States*, App. D.C., 368 A.2d 1136 (1977).

Competency of prosecutrix committed to court's discretion. — The competency of the prosecutrix to testify in a prosecution for carrying a dangerous weapon is a threshold question of law committed to the trial court's discretion. *United States v. Benn*, 476 F.2d 1127 (D.C. Cir. 1973).

In view of overwhelming direct evidence, any claimed error harmless. — In a prosecution for carrying a dangerous weapon, in view of overwhelming direct evidence timely placing the defendant at the scene of the crime and the equivocal and unsupported nature of his own testimony concerning his whereabouts at the time of the offense, any emphasis by the court or his counsel on his more general defenses and any other claimed error is harmless beyond a reasonable doubt. *United States v. Craven*, 458 F.2d 802 (D.C. Cir. 1972).

Evidence sufficient to find identification despite time lapse following offense. — Evidence in a prosecution of carrying a pistol without a license may be sufficient to permit a finding of identification beyond a reasonable doubt even considering an over-a-year time lapse between the offense and a positive identification of the defendant at the lineup. *Tolliver v. United States*, App. D.C., 378 A.2d 679 (1977).

Evidence was sufficient for a reasonable person to find identification evidence convincing beyond a reasonable doubt where the complaining witness had a good opportunity to observe the assailant in the daylight, where he was positive of his identification, and where he identified defendant more than once. *Goins v. United States*, App. D.C., 617 A.2d 956 (1992).

Evidence deemed relevant. — A demonstration of the way a razor might be used as a weapon made by an officer during the trial is relevant to the issue of whether the razor was a dangerous or deadly weapon. *Clarke v. United States*, App. D.C., 256 A.2d 782 (1969).

Testimony, in a prosecution for assault with a dangerous weapon and carrying a concealed weapon, by the complaining witness concerning an alleged rape by the defendant is highly probative of the defendant's intent and motive in pointing the gun at her and in explaining the circumstances surrounding the use of the gun. *Wooten v. United States*, App. D.C., 285 A.2d 308 (1971).

Evidence admissible. — Evidence of the circumstances surrounding a prior robbery investigation involving the defendant in a prosecution for carrying a pistol without a license is admissible where it is clearly relevant to an identification question. *United States v. Mizzell*, 452 F.2d 1328 (D.C. Cir. 1971).

Having taken the stand in a prosecution for carrying a dangerous weapon without a license, evidence of a prior conviction for impersonating the owner of a federal check is admissible for impeachment purposes. *United States v. Moore*, 459 F.2d 1360 (D.C. Cir. 1972).

In a prosecution for carrying a dangerous weapon, there may be a claim of self-defense, suicide, accidental death or any other plausible issue that will justify an inquiry into the victim's state of mind. *United States v. Brown*, 490 F.2d 758 (D.C. Cir. 1973).

Permitting a police officer to testify regarding the direction from which a shot causing a bullet hole in a wall was fired does not constitute an abuse of discretion in a prosecution for carrying a dangerous weapon. *United States v. Pierson*, 503 F.2d 173 (D.C. Cir. 1974).

Testimony of the arresting officer who lost the note on which he jotted down the assault victim's description of the assailant is not, in a prosecution for carrying a pistol without a license, inadmissible under the Jencks Act. *Hardy v. United States*, App. D.C., 316 A.2d 867 (1974).

Though it is hearsay, testimony of the defendant's employer concerning the contents of an alleged telephone threat against the defendant should be admitted to show state of mind, in a prosecution for carrying a pistol without a license. *Cooper v. United States*, App. D.C., 353 A.2d 696 (1975).

In a prosecution for carrying a pistol without a license, the court does not abuse its discretion in admitting into evidence matched sets of masks and hats found in the vehicle in which the defendants had been riding, in view of the fact that loaded guns were also found in the vehicle. *Punch v. United States*, App. D.C., 377 A.2d 1353 (1977), cert. denied, 435 U.S. 955, 98 S. Ct. 1586, 55 L. Ed. 2d 806 (1978).

Evidence of previous altercation between defendant and party with whom he had second altercation from which charge arose was admissible to show, or tending to show, that defendant's purpose in carrying knife on day of second altercation was its use as a deadly or dangerous weapon. *Lewis v. United States*, App. D.C., 567 A.2d 1326 (1989).

Evidence inadmissible. — It is difficult to attach any impeaching quality to dangerous weapons not charged to the possession of the defendant. *Macklin v. United States*, 410 F.2d 1046 (D.C. Cir. 1969).

A certificate of no record of a license to carry a pistol was properly admitted where the statement that defendant had no license to carry a pistol was self-authenticating and satisfied the foundational requirements; the statement was accompanied by the required certification and seal; the statement was signed by the one who conducted the search indicating personal knowledge of the facts stated; and the statement contained the pertinent statutory language indicating the records searched were established and maintained pursuant to a legal duty. *Hunter v. United States*, App. D.C., 590 A.2d 1048 (1991).

Evidence sufficient to prove use of pistol. — Evidence was sufficient to prove that defendant used a real or imitation pistol during a robbery. *Bates v. United States*, App. D.C., 619 A.2d 984 (1993).

Evidence sufficient to support conviction. — A police officer's independent testimony with respect to the defendant's possession of a gun to which no objection is made is sufficient to support a conviction for carrying a pistol without a license. *Lee v. United States*, App. D.C., 242 A.2d 212 (1968).

Evidence is sufficient to sustain a conviction for carrying a pistol without a license although the government does not offer any direct proof of the defendant's knowledge of the gun. *Powell v. United States*, App. D.C., 246 A.2d 641 (1968).

Evidence that the defendant had on his person a "pegged" knife, is sufficient to support a conviction for carrying a dangerous weapon. *Gilmore v. United States*, App. D.C., 271 A.2d 783 (1970).

Evidence that a pistol was found in the defendant's automobile shortly after alighted from the automobile, that the automobile was owned by the defendant and that ammunition found in the possession of the defendant was of the same caliber as that of the pistol found in the automobile is sufficient to a conviction of carrying a pistol without a license. *Banks v. United States*, App. D.C., 287 A.2d 85 (1972).

Affidavits of the records division director that the defendant did not have a license to carry a pistol and evidence that he was not carrying a license as required sustained a conviction for

carrying a pistol without a license. *Durant v. United States*, App. D.C., 292 A.2d 157 (1972), cert. denied, 409 U.S. 1127, 93 S. Ct. 946, 35 L. Ed. 2d 259 (1973).

Evidence which is adequate to enable the jury to find that the possession of weapons which were in a car in which the defendants were riding can be knowledgeably attributable to the defendants is sufficient to sustain their convictions for carrying a dangerous weapon. *United States v. Matthews*, 480 F.2d 1191 (D.C. Cir. 1973).

The fact that the searching officer found a pistol in an automobile in which the defendant and his companion were riding is sufficient to sustain a conviction of carrying a pistol without a license. *United States v. McDonald*, 481 F.2d 513 (D.C. Cir. 1973).

Evidence is sufficient to support a conviction as a repeat offender of carrying a pistol without a license against a defendant who was pointed out to police officers after officers heard a gunshot and who was found in an automobile which had a operable pistol, the fresh smell of gunpowder and live rounds of ammunition. *Ragland v. United States*, App. D.C., 299 A.2d 141 (1973).

Evidence is sufficient to support a conviction of carrying a pistol without a license against a defendant who was driving a vehicle which had been loaned to him by his employer and in the glove compartment of which a police officer found a pistol. *Patterson v. United States*, App. D.C., 301 A.2d 67 (1973).

Evidence may sustain a conviction of a passenger in the rear seat of a car for carrying without a license a pistol which was found on the front seat. *Johnson v. United States*, App. D.C., 309 A.2d 497 (1973), cert. denied, 416 U.S. 951, 94 S. Ct. 1960, 40 L. Ed. 2d 301 (1974).

Evidence that the defendant was armed and was threatening an individual with serious bodily injury, that he was aware that he was being followed by a uniformed special officer and that he turned and shot the officer is sufficient, apart from the issue of mental responsibility, to support a guilty verdict of carrying a dangerous weapon. *United States v. Taylor*, 510 F.2d 1283 (D.C. Cir. 1975).

The testimony of the complainant and others concerning the incident a reasonably permits a finding of guilty on the charge of carrying a dangerous weapon. *Wooten v. United States*, App. D.C., 343 A.2d 281 (1975).

Identification evidence is sufficient to support a conviction of carrying a pistol without a license. *Brown v. United States*, App. D.C., 372 A.2d 557, cert. denied, 434 U.S. 921, 98 S. Ct. 397, 54 L. Ed. 2d 278 (1977).

Where evidence showed that defendant both intended to and did carry and twirl around his body a nunchaku in the midst of a crowd of onlookers, the trial court was apprised of cir-

cumstances "sufficiently probative" to allow it to conclude beyond a reasonable doubt that defendant was carrying a deadly or dangerous weapon in violation of this section. *In re S.P.*, App. D.C., 465 A.2d 823 (1983).

Defendant's ownership of vehicle where pistol was found, his operation of that vehicle, and circumstances showing his knowledge that pistol was in the trunk of the vehicle are sufficient to sustain conviction under this section. *United States v. Duncan*, 115 WLR 2517 (Super. Ct. 1987).

Although defendant presented evidence that the apartment where he was arrested was his home, where there was substantial evidence from which the jury could justifiably have inferred that defendant did not live in the apartment and that the apartment was used as a shooting gallery, the evidence was sufficient to justify the jury in finding defendant guilty beyond a reasonable doubt. *Hilliard v. United States*, App. D.C., 638 A.2d 698 (1994).

Evidence sufficient to sustain conviction. — See *Stewart v. United States*, App. D.C., 383 A.2d 330 (1978); *Hamilton v. United States*, App. D.C., 395 A.2d 24 (1978); *Lewis v. United States*, App. D.C., 567 A.2d 1326 (1989); *Fortune v. United States*, App. D.C., 570 A.2d 809 (1990); *Mihis v. United States*, App. D.C., 618 A.2d 197 (1992); *Ransom v. United States*, App. D.C., 630 A.2d 170 (1993).

Evidence was insufficient to support conviction on either a theory of constructive possession or a theory of aiding and abetting. *In re L.A.V.*, App. D.C., 578 A.2d 708 (1990).

E. Instructions.

Prosecutor's comments not impermissibly prejudicial. — In a prosecution for carrying a pistol without a license, the prosecutor's statements concerning whether a conscientious jury could be "conned" into rendering a verdict of not guilty and concerning a defense witness who was "conjured up" are not impermissibly prejudicial. *United States v. Johnson*, 527 F.2d 1381 (D.C. Cir. 1976).

Improper prosecutorial reference. — In a prosecution for carrying a dangerous weapon, the prosecutor's reference to the defendant as a "burglar, thief, robber" is improper. *Maxwell v. United States*, App. D.C., 297 A.2d 771 (1972), cert. denied, 412 U.S. 921, 93 S. Ct. 2740, 37 L. Ed. 2d 147 (1973).

Matters of fact determined by jury. — In a prosecution for carrying a dangerous weapon, all matters of fact are to be determined by the jury. *United States v. Dixon*, 469 F.2d 940 (D.C. Cir. 1972).

Questions for trier of fact. — In a prosecution for carrying a gun without a license, whether the defendant had a license is a ques-

tion for the jury. *Bussie v. United States*, App. D.C., 81 A.2d 247 (1951).

The question whether the weapon was in such proximity as to be convenient of access and within reach is for the jury. *Wilson v. United States*, 198 F.2d 299 (D.C. Cir. 1952).

The question as to whether the place at which the defendant was carrying weapons was his place of business is for the jury. *Alexander v. United States*, 210 F.2d 727 (D.C. Cir. 1954).

In a prosecution for carrying a dangerous weapon, the issue of insanity is for the jury. *Niport v. United States*, 263 F.2d 901 (D.C. Cir. 1959).

The question of identification is one of fact for the jury. *Durham v. United States*, App. D.C., 237 A.2d 830 (1968).

It is a jury question whether a pistol lying on the front seat of an automobile next to the defendant driver was within convenient access and reach so that he might be found to have had possession. *Waterstaat v. United States*, App. D.C., 252 A.2d 507 (1969).

Whether a front seat passenger had knowledge of the presence of an unlicensed gun in the rear seat is a question for the trier. *Holley v. United States*, App. D.C., 286 A.2d 222 (1972).

This section prohibits the knowing carrying and knowing possession of a pistol in any part of an automobile, and that, in the former instance, the issue of accessibility should be left to the jury, whether or not the pistol is within the immediate physical reach of the accused. *United States v. Duncan*, 115 WLR 2517 (Super. Ct. 1987).

Evidence sufficient to present jury question on weapon's deadliness. — Evidence that the defendant was a considerable distance from his home, in a public eating establishment, standing in front of the cash register with a kitchen knife openly displayed in his belt is sufficient to present a jury question as to whether the knife was a deadly or dangerous weapon. *Nelson v. United States*, App. D.C., 280 A.2d 531 (1971).

Constructive possession. — Instruction which made no reference to the elements of constructive possession was insufficient to support conviction based upon constructive possession of a pistol. *Jefferson v. United States*, App. D.C., 558 A.2d 298, modified on other grounds, App. D.C., 571 A.2d 178 (1989), cert. denied, 493 U.S. 1032, 110 S. Ct. 748, 107 L. Ed. 2d 765 (1990).

Missing witness instruction held reversible error. — Reversible error found in a prosecution for carrying a pistol without a license where trial court gave missing witness instruction without first determining whether it was within the party's power to produce the witness and whether the witness' testimony would elucidate the transaction in issue.

Simmons v. United States, App. D.C., 444 A.2d 962 (1982).

Where charge adequate and no confusion, court may give "Allen" charge. — In a prosecution for carrying a deadly or dangerous weapon, where the charge is adequate and there is no cause for confusion, it is within the court's discretion to give the "Allen" charge. *Leftwich v. United States*, App. D.C., 251 A.2d 646 (1969).

But Allen charge should not be coercive to the point of requiring reversal. *Winters v. United States*, App. D.C., 317 A.2d 530 (1974).

Failure to reinstruct deemed error. — Where jurors sent the trial judge a series of notes indicating that they were unable to agree on a verdict on the predicate offense (assault with a dangerous weapon), but that they had reached a verdict on the compound offense (possession of a firearm during a crime of violence), the trial judge committed reversible error by failing to reinstruct the jurors, since it was apparent that, in the absence of reinstruction, they were likely to return inconsistent verdicts. *Whitaker v. United States*, App. D.C., 617 A.2d 499 (1992).

Charge adequate. — A charge to the jury outlining the various necessary elements of carrying a deadly or dangerous weapon, defining a "deadly or dangerous weapon" and advising that in determining whether the instrument was such a weapon "you may consider all the circumstances surrounding its possession and use" is adequate. *Leftwich v. United States*, App. D.C., 251 A.2d 646 (1969).

Instruction "plain error." — It is plain error to charge that the defendant be found guilty of carrying a dangerous weapon on a date different than that charged. *United States v. Williams*, 463 F.2d 958 (D.C. Cir. 1972).

Instruction not "plain error." — An instruction that the government has no affirmative duty to make a paraffin test of a gun seized from the defendant is not "plain error." *Wooten v. United States*, App. D.C., 285 A.2d 308 (1971).

Judge's inartful comments regarding the difference between "possession" and "carrying" did not result in "plain error." *Deneal v. United States*, App. D.C., 551 A.2d 1312 (1988).

Instruction properly refused. — In a prosecution for carrying a pistol without a license, a requested instruction requiring an acquittal if the jury finds that the possession of the pistol was for an innocent purpose is too broad and is properly refused. *Mitchell v. United States*, App. D.C., 302 A.2d 216 (1973).

Where the defendant is acquainted with a potential witness and makes no effort to locate him or call him as a witness, the court properly refuses to give a missing witness instruction.

Anderson v. United States, App. D.C., 352 A.2d 392 (1976).

Where, during a prosecution for carrying a pistol without a license, evidence of self-defense is absent, the court properly refuses instruction on that subject. *Hale v. United States*, App. D.C., 361 A.2d 212 (1976).

The trial judge properly denied to instruct the jury on appellant's defense theory. *Campos v. United States*, App. D.C., 617 A.2d 185 (1992).

F. Sentencing.

1. In General.

Judge must determine that guilty plea voluntary and intelligent. — The judge must determine that a plea of guilty to carrying a deadly weapon is made voluntarily, after proper advice, with an understanding of the nature of the charge and the consequences. *Barnett v. United States*, 403 F.2d 918 (D.C. Cir. 1968).

One-year sentence for carrying dangerous weapon without a license is not plainly illegal. *United States v. Evans*, 459 F.2d 1134 (D.C. Cir. 1972).

Court may sentence without credit for days elapsed since guilty plea. — The court does not abuse discretion in sentencing a defendant, who pleads guilty and whose motions for continuation of bail and for immediate sentencing are denied, without crediting him for the days which elapsed between the plea and the date on which he is sentenced. *Epperson v. Anderson*, 326 F.2d 665 (D.C. Cir. 1963).

Sentence may include condition of restitution. — The imposition of a condition of restitution as part of the sentence imposed upon a conviction of assault with a deadly weapon and possession of a pistol without a license is not contrary to this section nor an abuse of the court's sentencing discretion. *Barker v. United States*, App. D.C., 373 A.2d 1215 (1977).

Conviction of vehicle passenger does not preclude conviction of driver. — The fact that the passenger in a vehicle driven by the defendant is convicted of carrying a pistol without a license does not preclude a conviction of the driver for the same offense. *Waterstaat v. United States*, App. D.C., 252 A.2d 507 (1969).

Carrying 2 unlicensed pistols single offense. — A defendant who simultaneously carried 2 pistols, each of which was unlicensed, committed but a single offense, and cannot be given consecutive sentences. *Cormier v. United States*, App. D.C., 137 A.2d 212 (1957).

Sentences for carrying weapon and assault can be cumulated. — Sentences for carrying a pistol without a license and assault with a dangerous weapon can be cumulated, notwithstanding that both counts arise out of a single transaction, where the defendant did not

carry the pistol with a particular purpose in mind. *United States v. Lucas*, 441 F.2d 1056 (D.C. Cir. 1971).

Or consecutive. — The imposition of consecutive sentences for assault with a dangerous weapon and carrying a dangerous weapon is proper, notwithstanding the fact that the offenses arose out of the same transaction. *Hammond v. United States*, App. D.C., 345 A.2d 140 (1975).

Consecutive sentences not violative of double jeopardy clause. — Defendant's consecutive sentences for pleading guilty to carrying a pistol without a license and possession of an unregistered firearm did not violate the double jeopardy clause, because his conduct constituted a single incident. *Tyree v. United States*, App. D.C., 629 A.2d 20 (1993).

And acquittal of assault does not require an acquittal of carrying a pistol. *Cooke v. United States*, 275 F.2d 887 (D.C. Cir. 1960).

Or vice versa. — The fact that the jury acquits the defendant of carrying a dangerous weapon does not require them to find him not guilty of assault with a deadly weapon. *Winters v. United States*, App. D.C., 317 A.2d 530 (1974).

Manslaughter finding not inconsistent with acquittal for carrying pistol. — Finding a defendant who allegedly shot the victim with a pistol guilty of manslaughter and not guilty of carrying a pistol without a license is not fatally inconsistent and does not require reversal. *Steadman v. United States*, App. D.C., 358 A.2d 329 (1976).

Offense under this section does not merge with § 22-502 or § 22-3202. — The Council intended the amendment to this section by 1989 D.C. Act 8-120, to create a new firearm possession offense which would be violated if an underlying dangerous crime or crime of violence was committed while possessing a firearm or imitation firearm. The new provision did not create an enhancement provision, but a new offense which does not merge with § 22-502 or § 22-3202, and the Council contemplated that multiple punishments would be imposed. *Freeman v. United States*, App. D.C., 600 A.2d 1070 (1991).

The legislature was aware that it had created 2 separate statutory provisions, this section and § 22-3202, that in many circumstances could apply simultaneously to the same conduct, and at no time did the legislature clearly state, nor did it incorporate into either provision, any suggestion that the 2 provisions should merge. *Thomas v. United States*, App. D.C., 602 A.2d 647 (1992).

Conviction for assault with a dangerous weapon (§ 22-502) did not merge with later conviction for possession of a firearm during the commission of a crime of violence (subsection

(b)). *Freeman v. United States*, App. D.C., 600 A.2d 1070 (1991).

Conviction under subsection (b) of this section for possession of a firearm during a crime of violence does not merge into a conviction under §§ 22-501 and 22-3202, for assault with intent to kill while armed. *Little v. United States*, App. D.C., 613 A.2d 880 (1992).

Defendant can be convicted of federal bank robbery and also under this section. *United States v. Canty*, 469 F.2d 114 (D.C. Cir. 1972).

The legislative intent that there be a single conviction for federal bank robbery, and assaults comprised therein, does not preclude the conviction of a defendant for carrying a dangerous weapon. *United States v. Knight*, 509 F.2d 354 (D.C. Cir. 1974).

Convictions did not merge. — Conviction for possession of a firearm during a crime of violence did not merge with predicate convictions for armed robbery, burglary while armed, and assault with intent to commit robbery while armed. *Poole v. United States*, App. D.C., 630 A.2d 1109 (1993), cert. denied, — U.S. —, 115 S. Ct. 160, 130 L. Ed. 2d 98 (1994).

Kidnapping of victim D, kidnapping of victim E, assault of victim H with a dangerous weapon, and assault of victim J with a dangerous weapon all concerned different victims. Accordingly, no merger occurred between any of these counts. *Hanna v. United States*, 666 A.2d 845 (D.C. App. 1995).

Relationship of section to federal firearm provisions. — Since the "unlawful" carrying element of 18 U.S.C. § 924(c)(2) (punishing unlawfully carrying a firearm during the commission of a felony) involves the offense under this section, dual convictions and separate sentences under 18 U.S.C. § 924(c)(2) and this section are not authorized. *United States v. Dorsey*, 591 F.2d 922 (D.C. Cir. 1978).

Although dual convictions and separate sentences under this section and 18 U.S.C. § 924(c)(2) (unlawfully carrying a firearm during the commission of a felony) are not authorized, there is no statutory or constitutional stricture that prevents separate sentences from being imposed for violations of 18 U.S.C. § 922(k) (receipt of a pistol in interstate commerce with serial number removed) and either 18 U.S.C. § 924(c)(2) or this section. *United States v. Dorsey*, 591 F.2d 922 (D.C. Cir. 1978).

Juvenile conviction may be remanded for possible sentencing under Youth Corrections Act. — A conviction of a juvenile of carrying a dangerous weapon may be remanded to the lower court to consider sentencing under the Youth Corrections Act. *United States v. Howard*, 449 F.2d 1086 (D.C. Cir. 1971).

But judge's refusal to sentence youth under the Act is within his discretion. Paul

v. United States, App. D.C., 301 A.2d 226 (1973).

No sentencing under Young Adult Offenders Act. — A defendant convicted of carrying a pistol without a license is not eligible for sentencing under the Young Adult Offenders Act. *Atkinson v. United States*, App. D.C., 295 A.2d 899 (1972).

2. Enhanced Punishment Provision.

Recidivist provisions of this section are not unconstitutional. *Jones v. United States*, App. D.C., 299 A.2d 538 (1973).

Role of enhanced punishment in deterring violent crimes. — The United States Attorney has the responsible role in implementing the possibility that crimes of violence may be deterred by visiting severe punishment upon a convicted felon later found carrying a deadly weapon. *Epperson v. United States*, 371 F.2d 956 (D.C. Cir. 1967).

No purpose served by giving repeat offender lenient sentence. — This provision evidences the Congressional belief that no purpose would be served by giving a repeat offender a lenient sentence because he obviously was not rehabilitated by serving the lenient sentence the first time. *Tuten v. United States*, App. D.C., 440 A.2d 1008 (1982), *aff'd*, 460 U.S. 660, 103 S. Ct. 1412, 75 L. Ed. 2d 359 (1983).

Enhanced penalty under this section depends on type of prior conviction, not on the type of sentence received for the prior conviction. *Tuten v. United States*, App. D.C., 440 A.2d 1008 (1982), *aff'd*, 460 U.S. 660, 103 S. Ct. 1412, 75 L. Ed. 2d 359 (1983).

Section does not mandatorily require a prosecution of a "repeater." *Martin v. United States*, App. D.C., 283 A.2d 448 (1971).

Precondition to the imposition of a greater than 1-year sentence is a prior conviction of a similar offense or of any other felony. *United States v. Lucas*, 441 F.2d 1056 (D.C. Cir. 1971).

Accused recidivist must be sheltered by suitable safeguards against an improper sentence including reasonable notice of the charge, the opportunity to be heard, the right to counsel, and proof of the prior conviction. *United States v. Clemons*, 440 F.2d 205 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 945, 91 S. Ct. 959, 28 L. Ed. 2d 227 (1971).

And where no proof of prior conviction, penalty not invoked. — Where there is no proof that the defendant was ever convicted previously, the felony penalty cannot be invoked. *Burrell v. United States*, App. D.C., 223 A.2d 377 (1966).

Where, during the sentencing proceedings, there is no mention of a prior conviction and there is no proof of such a conviction in the presence of the defendant, the imposition of an

increased sentence is improper. *United States v. Marshall*, 440 F.2d 195 (D.C. Cir.), *cert. denied*, 400 U.S. 909, 91 S. Ct. 153, 27 L. Ed. 2d 148 (1970).

But no jury finding does not preclude sentencing. — The fact that the jury makes no finding as to prior felony convictions does not preclude sentencing under the repeat offender provision. *Anderson v. United States*, App. D.C., 326 A.2d 807 (1974), *cert. denied*, 420 U.S. 978, 95 S. Ct. 1405, 43 L. Ed. 2d 659 (1975).

Appropriate inquiries in proceedings to increase punishment. — In proceedings to increase the punishment under the recidivist provisions of this section, not only the existence of a prior conviction, but also its character, its continuing efficacy, and its constitutional validity, are among the inquiries appropriate. *United States v. Clemons*, 440 F.2d 205 (D.C. Cir. 1970), *cert. denied*, 401 U.S. 945, 91 S. Ct. 959, 28 L. Ed. 2d 227 (1971).

Section does not define "felony." *Scott v. United States*, App. D.C., 392 A.2d 4 (1978).

"Felony" defined. — A "felony" for the purposes of this section is any offense for which the maximum penalty provided for the offense is imprisonment for more than 1 year. *Henson v. United States*, App. D.C., 399 A.2d 16, *cert. denied*, 444 U.S. 848, 100 S. Ct. 96, 62 L. Ed. 2d 62 (1979).

Petit larceny is not a felony for purposes of determining the maximum sentences permitted under this section. *Henson v. United States*, App. D.C., 399 A.2d 16, *cert. denied*, 444 U.S. 848, 100 S. Ct. 96, 62 L. Ed. 2d 62 (1979).

Prior court-martial conviction as felony. — Congress cannot have intended to exclude all court-martial convictions from consideration for enhancement of punishment purposes under this section. *Scott v. United States*, App. D.C., 392 A.2d 4 (1978).

Trial court did not err in characterizing a defendant's prior court-martial conviction for assault of a superior commissioned officer as a "felony" conviction for the purpose of converting his sentence from a misdemeanor, pursuant to § 22-3215, to a felony. *Scott v. United States*, App. D.C., 392 A.2d 4 (1978).

Prosecutor authorized to charge under felony-repeater provisions. — The prosecutor has authority to charge the defendant under the felony-repeater provisions of this section rather than under § 22-3202. *Palmore v. United States*, App. D.C., 290 A.2d 573 (1972), *aff'd*, 411 U.S. 389, 93 S. Ct. 1670, 36 L. Ed. 2d 342 (1973).

But not under § 22-104. — The prosecution has no authority to charge the defendant under § 22-104 as a "general" repeat offender for carrying a dangerous weapon and possessing a prohibited weapon. *Martin v. United States*, App. D.C., 283 A.2d 448 (1971).

Habitual offender enhancement provisions of § 22-104a applicable. — A defendant convicted of carrying a pistol without a license under this section may be subject not only to the sentence enhancement provision of that section, but also to the habitual offender enhancement provisions of § 22-104a. *Bigelow v. United States*, App. D.C., 498 A.2d 210 (1985), dismissed sub nom. *Bigelow v. Knight*, 737 F. Supp. 669 (1990).

Previous conviction hereunder, not set aside under Federal Youth Corrections Act, properly considered. — Where defendant's previous conviction under this section was not set aside under former § 5021(b) of the former Federal Youth Corrections Act of 1950, 18 U.S.C. § 5005 et seq. [Repealed], because defendant was unconditionally discharged from probation upon the completion, not prior to the completion, of the 2-year term of probation to which he was initially sentenced under former § 5010(a), the trial court was free to take the defendant's previous conviction into account in imposing sentence under the recidivist provision of this section. *Tuten v. United States*, 460 U.S. 660, 103 S. Ct. 1412, 75 L. Ed. 2d 359 (1983).

Conviction under section cannot be converted into felony offense. — In the same proceeding, a single prior felony conviction may not be used to convert a conviction under this section into a felony offense and to serve as one of the 2 prior felony convictions for enhanced sentencing under § 22-104a. *Henson v. United States*, App. D.C., 399 A.2d 16, cert. denied, 444 U.S. 848, 100 S. Ct. 96, 62 L. Ed. 2d 62 (1979).

Although in *Henson v. United States*, App. D.C., 399 A.2d 16, cert. denied, 444 U.S. 848, 100 S. Ct. 96, 62 L. Ed. 2d 62 (1979), the court held that "in the same proceeding, a single prior felony conviction may not be used to convert a conviction under § 22-3204 into a felony offense and to serve as one of the two prior felony convictions for enhanced sentencing under § 22-104a," where none of defendant's prior felony convictions is used to do "double duty," this rule is inapplicable. *Bigelow v. United States*, App. D.C., 498 A.2d 210 (1985), dismissed sub nom. *Bigelow v. Knight*, 737 F. Supp. 669 (1990).

And convictions from separate indictment cannot enhance punishment. — Convictions arising from a separate indictment handed down on the same date cannot be relied on to enhance punishment as a 3rd offender. *Washington v. United States*, App. D.C., 343 A.2d 560 (1975).

But prior felony conviction may enhance punishment more than once. — *Henson v. United States*, App. D.C., 399 A.2d 16, cert. denied, 444 U.S. 848, 100 S. Ct. 96, 62 L. Ed. 2d 62 (1979), does not require that a prior felony conviction be used only once for

enhanced punishment where there are multiple charges in a single criminal proceeding, and no attempt is made to use a converted felony for § 22-104a purposes. *Jones v. United States*, App. D.C., 416 A.2d 1236 (1980).

Defense counsel's concession of prior conviction insufficient proof. — Where the defendant's counsel stipulates that the defendant has previously been convicted of a felony and waives later proof thereof, but this concession is made without the defendant's knowledge or consent, there is no waiver. *Jackson v. United States*, 221 F.2d 883 (D.C. Cir. 1955).

In a prosecution for carrying an unlicensed pistol and for increased punishment by reason of recidivism, the defense counsel's concession that the defendant had been convicted of robbery is insufficient proof. *United States v. Clemons*, 440 F.2d 205 (D.C. Cir. 1970), cert. denied, 401 U.S. 945, 91 S. Ct. 959, 28 L. Ed. 2d 227 (1971).

Mandatory procedure for imposing more severe sentence must be followed. — In imposing a more severe sentence for carrying a pistol without a license where the defendant has suffered a prior similar conviction or a prior felony conviction, the mandatory statutory procedure must be followed. *Coleman v. United States*, App. D.C., 295 A.2d 896 (1972).

And where not invoked, sentence vacated. — Where the enhanced penalty provisions for conviction of carrying a dangerous weapon are not properly invoked, the sentence imposed must be vacated. *Savage v. United States*, App. D.C., 313 A.2d 880 (1974).

Delay in charging previous felony, in order to obtain "rap sheet" objectionable. — A delay between charging the defendant with carrying a deadly weapon and charging him instead with carrying a dangerous weapon after having previously been convicted of a felony is not objectionable where it takes time to obtain the so-called "rap sheet" from the F.B.I. *Epperson v. United States*, 371 F.2d 956 (D.C. Cir. 1967).

Sentence deemed not unduly severe. — A sentence of not less than 3 or more than 10 years is not unduly severe for carrying a deadly weapon after a previous conviction of a similar offense or of a felony where the defendant has prior convictions of housebreaking, grand larceny and receiving stolen property and has failed to consistently report back to jail in the interim between the entry of his guilty plea and the date of his sentencing. *Barnett v. United States*, 403 F.2d 918 (D.C. Cir. 1968).

G. Appeal.

Frivolous appeal will be dismissed. *Walker v. United States*, App. D.C., 304 A.2d 290, cert. denied, 414 U.S. 1007, 94 S. Ct. 368, 38 L. Ed. 2d 245 (1973).

Appeal following serving of sentence not moot. — Where a defendant who is convicted of carrying a dangerous weapon without a license has served his sentence, his appeal is not dismissible as moot. *Macklin v. United States*, 410 F.2d 1046 (D.C. Cir. 1969).

Sentence within statutory limits not reviewable as too severe. — Defendant's one-sentence assertion that his sentences for possession of a firearm during a crime of violence were "undue and oppressive, given the acts constituting the offense for which he was convicted," was not reviewable on appeal, as the appellate court will not review on appeal sentences which are within statutory limits upon the assertion that such sentences are too severe. *Poole v. United States*, App. D.C., 630 A.2d 1109 (1993), cert. denied, — U.S. —, 115 S. Ct. 160, 130 L. Ed. 2d 98 (1994).

Release pending appeal denied where safety to others not assured. — A motion for release on personal recognizance pending an appeal from a conviction of carrying a dangerous weapon, after a conviction of a felony, will be denied where no conditions will reasonably assure that the appellant will not pose a danger to any other person or to the community. *United States v. Blyther*, 407 F.2d 1279 (D.C. Cir.), cert. denied, 394 U.S. 953, 89 S. Ct. 1296, 22 L. Ed. 2d 488 (1969).

Where events create possibility of diverting jury, retrial required. — Where events create a substantial possibility of diverting the jury deliberations from an essential neutral and nondistracting atmosphere, a retrial is required as a matter of law. *Morton v. United States*, App. D.C., 415 A.2d 800 (1980).

Failure to voice objection precludes assertion of issue on appeal. — Absent plain error, failure to voice an objection to the introduction of a knife in a prosecution for carrying a deadly weapon precludes an assertion on appeal that the admission was error. *Best v. United States*, App. D.C., 237 A.2d 825 (1968).

Sufficient independent evidence supports separate weapon's charge. — Where charges of carrying a dangerous weapon are sufficiently proved by other independent evidence, the fact that a conviction in the same trial of first degree murder is reversed does not require a reversal of the weapons charge. *United States v. Brown*, 490 F.2d 758 (D.C. Cir. 1973).

Where record shows possession, absence of informed decision on counsel

does not require reversal. — Where the record shows that the defendant was found in possession of a concealed weapon and his own testimony on trial confirms such a fact, the absence of any indication that he made an informed decision to proceed with a joint counsel does not require reversal. *Ford v. United States*, 379 F.2d 123 (D.C. Cir. 1967).

And where sufficient evidence for concurrent sentence, sufficiency of weapon's evidence not determined. — A determination of whether the evidence is sufficient to sustain a conviction for carrying a dangerous weapon without a license will not be made where the defendant is convicted upon sufficient evidence of a different offense and the sentences imposed run concurrently. *Hart v. United States*, App. D.C., 187 A.2d 329 (1963).

Case remanded for resentencing on weapon's conviction where general sentence reversed. — Where the general sentence imposed following convictions for robbery, assault with a dangerous weapon, and carrying a concealed weapon is in excess of the statutory maximum for carrying a concealed weapon, and the convictions for robbery and assault with a dangerous weapon are required to be reversed, the case will be remanded for resentencing for carrying a concealed weapon. *Ford v. United States*, 379 F.2d 123 (D.C. Cir. 1967).

Double jeopardy plea not valid where informations charge separate offenses. — A plea of double jeopardy is not a valid plea in a new prosecution where the informations charge separate and distinct offenses. *Newman v. United States*, App. D.C., 239 A.2d 152 (1968).

And does not prevent prosecution following earlier registration conviction. — The double jeopardy rule does not prevent a prosecution for unlicensed possession of a pistol, although the defendant has earlier been convicted of violating the District regulation requiring registration of the same pistol. *United States v. Wilder*, 463 F.2d 1263 (D.C. Cir. 1972).

Nor does collateral estoppel. — Collateral estoppel does not bar a prosecution for the federal offense of carrying a pistol without a license after a previous conviction for a violation of a regulation requiring registration of the same pistol. *United States v. Wilder*, 463 F.2d 1263 (D.C. Cir. 1972).

§ 22-3205. Exceptions to § 22-3204.

(a) The provisions of § 22-3204 shall not apply to marshals, sheriffs, prison or jail wardens, or their deputies, policemen or other duly appointed law-enforcement officers, or to members of the Army, Navy, Air Force, or Marine

Corps of the United States or of the National Guard or Organized Reserves when on duty, or to the regularly enrolled members of any organization duly authorized to purchase or receive such weapons from the United States, provided such members are at or are going to or from their places of assembly or target practice, or to officers or employees of the United States duly authorized to carry a concealed pistol, or to any person engaged in the business of manufacturing, repairing, or dealing in firearms, or the agent or representative of any such person having in his or her possession, using, or carrying a pistol in the usual or ordinary course of such business, or to any person while carrying a pistol unloaded and in a secure wrapper from the place of purchase to his or her home or place of business or to a place of repair or back to his or her home or place of business or in moving goods from one place of abode or business to another.

(b) The provisions of § 22-3204 with respect to pistols shall not apply to a police officer who has retired from the Metropolitan Police Department, if the police officer has registered a pistol and it is concealed on or about the police officer. (July 8, 1932, 47 Stat. 651, ch. 465, § 5; 1973 Ed., § 22-3205; May 7, 1993, D.C. Law 9-266, § 3, 39 DCR 5676; May 21, 1994, D.C. Law 10-119, § 15(d), 41 DCR 1639.)

Effect of amendments. — D.C. Law 10-119 inserted “or her” three times in (a).

Legislative history of Law 9-266. — Law 9-266, the “Handgun Possession Amendment Act of 1992,” was introduced in Council and assigned Bill No. 9-91, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on June 2, 1992, and July 7, 1992, respectively. Signed by the Mayor on July 21, 1992 it was assigned Act No. 9-247 and transmitted to both Houses of Congress for its review. D.C. Law 9-266 became effective on May 7, 1993.

Legislative history of Law 10-119. — See note to § 22-3202.

Burden of proving exception. — The defendant has the burden of bringing himself within the exception to the offense charged. *Williams v. United States*, App. D.C., 237 A.2d 539 (1968); *Middleton v. United States*, App. D.C., 305 A.2d 259 (1973).

Corrections officer is not prohibited from carrying pistol, whether or not “on duty.” *United States v. Pritchett*, 470 F.2d 455 (D.C. Cir. 1972).

Off-duty federal protective officer within the General Services Administration is not within exemption which applies to policemen and other duly appointed law-enforcement officers. *Middleton v. United States*, App. D.C., 305 A.2d 259 (1973).

Special policemen are commissioned for the special purpose of protecting property on the premises of the employer and do not have the general duties and the broad authority of a policeman or law enforcement officer in

the ordinary sense of those terms. *Franklin v. United States*, App. D.C., 271 A.2d 784 (1970), *aff’d*, 458 F.2d 861 (D.C. Cir. 1972).

And special policeman is not empowered to exercise authority outside property or area he is appointed to protect, or to carry weapons away from such an area, with certain exceptions. *Franklin v. United States*, 458 F.2d 861 (D.C. Cir. 1972).

But within section to extent he conforms to regulations. — A special police officer, who has been commissioned pursuant to § 4-115, will be considered a policeman or law-enforcement officer within the meaning of this section only to the extent that he acts in conformance with the regulations governing special officers. *Timus v. United States*, App. D.C., 406 A.2d 1269 (1979).

And not where not on duty nor traveling between work area and residence. — A defendant is neither a “policeman” nor a “law enforcement officer” he is a special policeman and he is not on actual duty in the place where he is arrested nor is traveling without deviation immediately before and immediately after the period of actual duty between such a place and his residence. *McKenzie v. United States*, App. D.C., 158 A.2d 912 (1960).

Where defendant deviated from a normal course of travel to work he was not entitled to rely on the special police officer defense to carrying a pistol without a license. *Shivers v. United States*, App. D.C., 533 A.2d 258 (1987).

The statutory exemption for dealers applies only to a dealer who is actually “engaged in the business of” dealing in firearms while in

possession of a pistol. *Bsharah v. United States*, App. D.C., 646 A.2d 993 (1994).

Hobby not business of repairing firearms. — A defendant charged with carrying a pistol for which he has no license is not engaged in the business of repairing firearms where

repairing guns is only his hobby. *Cormier v. United States*, App. D.C., 137 A.2d 212 (1957).

Cited in *Scott v. United States*, App. D.C., 259 A.2d 353 (1969), appeal denied, 427 F.2d 609 (D.C. Cir. 1970); *United States v. Lima*, App. D.C., 424 A.2d 113 (1980).

§ 22-3206. Issue of licenses to carry pistol.

The Chief of Police of the District of Columbia may, upon the application of any person having a bona fide residence or place of business within the District of Columbia or of any person having a bona fide residence or place of business within the United States and a license to carry a pistol concealed upon his or her person issued by the lawful authorities of any State or subdivision of the United States, issue a license to such person to carry a pistol within the District of Columbia for not more than 1 year from date of issue, if it appears that the applicant has good reason to fear injury to his or her person or property or has any other proper reason for carrying a pistol and that he or she is a suitable person to be so licensed. The license shall be in duplicate, in form to be prescribed by the Mayor of the District of Columbia and shall bear the name, address, description, photograph, and signature of the licensee and the reason given for desiring a license. The original thereof shall be delivered to the licensee, and the duplicate shall be retained by the Chief of Police of the District of Columbia and preserved in his or her office for 6 years. (July 8, 1932, 47 Stat. 651, ch. 465, § 6; 1973 Ed., § 22-3206; May 21, 1994, D.C. Law 10-119, § 15(e), 41 DCR 1639.)

Effect of amendments. — D.C. Law 10-119 inserted "or she" in the first sentence; and inserted "or her" throughout the section.

Legislative history of Law 10-119. — See note to § 22-3202.

Change in government. — This section originated at a time when local government powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 401 of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of the functions of the Board of Commissioners under this section to a single Commissioner. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-211), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-213(a)), appropriate changes in terminology were made in this section.

Application should be treated under proper regulatory criteria. — Applications

for licenses to carry concealed weapons should be treated under proper regulatory criteria duly adopted. *Jordan v. District of Columbia Bd. of Appeals & Review*, App. D.C., 315 A.2d 153 (1974).

And not considered extension of earlier application. — An application for a license to carry a concealed weapon cannot be considered merely an extension of an earlier application. *Jordan v. District of Columbia Bd. of Appeals & Review*, App. D.C., 315 A.2d 153 (1974).

Additional requirements not precluded. — This section does not preclude the Chief of Police from adopting additional license information requirements and criteria. *Jordan v. District of Columbia Bd. of Appeals & Review*, App. D.C., 315 A.2d 153 (1974).

Reasonable limitation. — A limitation which prohibits granting licenses for automatic or semiautomatic pistols is reasonable. *Jordan v. District of Columbia*, App. D.C., 362 A.2d 114 (1976).

Eligibility rule must be published. — Whatever rule is used in the District to determine eligibility for a license to carry a handgun must be adopted, published, and applied according to law and remain consistent with congressional policy. *Jordan v. District of Columbia Bd. of Appeals & Review*, App. D.C., 315 A.2d 153 (1974).

But nonpublication does not require blind issuance of license. — The fact that certain of the police regulations governing applications for a license to carry a concealed weapon in the District have not been compiled and published does not require the blind issuance of a license to a petitioner who fails to satisfy the regulations. *Jordan v. District of Columbia Bd. of Appeals & Review*, App. D.C., 315 A.2d 153 (1974).

Applicant need not only allege suitability. — An applicant is not entitled to relief from a denial of an application on the theory that he need only allege suitability and the police then have the burden of going forward to disprove

his claims. *Jordan v. District of Columbia*, App. D.C., 362 A.2d 114 (1976).

Appeals Board's deliberative process not covered by "Sunshine Act." — The deliberative process incident to the Board of Appeals and Review's final orders in regard to an application for a license to carry a concealed pistol is not covered by the "Sunshine Act." *Jordan v. District of Columbia*, App. D.C., 362 A.2d 114 (1976).

Cited in *Bethea v. United States*, App. D.C., 395 A.2d 787 (1978); *Gaulmon v. United States*, App. D.C., 465 A.2d 847 (1983); *Campos v. United States*, App. D.C., 617 A.2d 185 (1992).

§ 22-3207. Certain sales of pistols prohibited.

No person shall within the District of Columbia sell any pistol to a person who he or she has reasonable cause to believe is not of sound mind, or is forbidden by § 22-3203 to possess a pistol, or, except when the relation of parent and child or guardian and ward exists, is under the age of 21 years. (July 8, 1932, 47 Stat. 652, ch. 465, § 7; June 29, 1953, 67 Stat. 94, ch. 159, § 204(d); 1973 Ed., § 22-3207; May 21, 1994, D.C. Law 10-119, § 15(f), 41 DCR 1639.)

Effect of amendments. — D.C. Law 10-119 inserted "or she."

Legislative history of Law 10-119. — See note to § 22-3202.

Cited in *Mills v. United States*, App. D.C., 599 A.2d 775 (1991).

§ 22-3208. Transfers of firearms regulated.

No seller shall within the District of Columbia deliver a pistol to the purchaser thereof until 48 hours shall have elapsed from the time of the application for the purchase thereof, except in the case of sales to marshals, sheriffs, prison or jail wardens or their deputies, policemen, or other duly appointed law enforcement officers, and, when delivered, said pistol shall be securely wrapped and shall be unloaded. At the time of applying for the purchase of a pistol the purchaser shall sign in duplicate and deliver to the seller a statement containing his or her full name, address, occupation, color, place of birth, the date and hour of application, the caliber, make, model, and manufacturer's number of the pistol to be purchased and a statement that the purchaser is not forbidden by § 22-3203 to possess a pistol. The seller shall, within 6 hours after such application, sign and attach his or her address and deliver 1 copy to such person or persons as the Chief of Police of the District of Columbia may designate, and shall retain the other copy for 6 years. No machine gun, sawed-off shotgun, or blackjack shall be sold to any person other than the persons designated in § 22-3214 as entitled to possess the same, and then only after permission to make such sale has been obtained from the Chief of Police of the District of Columbia. This section shall not apply to sales at wholesale to licensed dealers. (July 8, 1932, 47 Stat. 652, ch. 465, § 8; June 29,

1953, 67 Stat. 94, ch. 159, § 204(e); 1973 Ed., § 22-3208; May 21, 1994, D.C. Law 10-119, § 15(g), 41 DCR 1639.)

Effect of amendments. — D.C. Law 10-119 substituted “the purchaser” for “he” near the end of the second sentence; and inserted “or her” in the second and third sentences.

Legislative history of Law 10-119. — See note to § 22-3202.

Prohibition on transfer of ammunition feeding devices. — For provisions prohibiting the transfer by the Metropolitan Police Department of ammunition feeding devices, see § 4-191.

For temporary prohibition on the transfer by the Metropolitan Police Department of any ammunition feeding device, see § 2 of the Prohibition on the Transfer of Firearms Emergency Act of 1995 (D.C. Act 11-58, May 18, 1995, 42 DCR 2574).

For temporary prohibition on the transfer by the Metropolitan Police Department of any ammunition feeding device, see § 2 of the Prohibition on the Transfer of Firearms Temporary Act of 1995, D.C. Law 11-35.

§ 22-3209. Dealers of weapons to be licensed.

No retail dealer shall within the District of Columbia sell or expose for sale or have in his or her possession with intent to sell, any pistol, machine gun, sawed-off shotgun, or blackjack without being licensed as provided in § 22-3210. No wholesale dealer shall, within the District of Columbia, sell, or have in his or her possession with intent to sell, to any person other than a licensed dealer, any pistol, machine gun, sawed-off shotgun, or blackjack. (July 8, 1932, 47 Stat. 652, ch. 465, § 9; 1973 Ed., § 22-3209; May 21, 1994, D.C. Law 10-119, § 15(h), 41 DCR 1639.)

Section references. — This section is referred to in § 22-3210.

Effect of amendments. — D.C. Law 10-119 inserted “or her” in the first and second sentences.

Legislative history of Law 10-119. — See note to § 22-3202.

Cited in *Coleman v. United States*, App. D.C., 619 A.2d 40 (1993).

§ 22-3210. Licenses of weapons dealers; records; by whom granted; conditions.

The Mayor of the District of Columbia may, in his or her discretion, grant licenses and may prescribe the form thereof, effective for not more than 1 year from date of issue, permitting the licensee to sell pistols, machine guns, sawed-off shotguns, and blackjacks at retail within the District of Columbia subject to the following conditions in addition to those specified in § 22-3209, for breach of any of which the license shall be subject to forfeiture and the licensee subject to punishment as provided in this chapter:

(1) The business shall be carried on only in the building designated in the license.

(2) The license or a copy thereof, certified by the issuing authority, shall be displayed on the premises where it can be easily read.

(3) No pistol shall be sold: (A) if the seller has reasonable cause to believe that the purchaser is not of sound mind or is forbidden by § 22-3203 to possess a pistol or is under the age of 21 years; and (B) unless the purchaser is personally known to the seller or shall present clear evidence of his or her identity. No machine gun, sawed-off shotgun, or blackjack shall be sold to any person other than the persons designated in § 22-3214 as entitled to possess

the same, and then only after permission to make such sale has been obtained from the Chief of Police of the District of Columbia.

(4) A true record shall be made in a book kept for the purpose, the form of which may be prescribed by the Mayor, of all pistols, machine guns, and sawed-off shotguns in the possession of the licensee, which said record shall contain the date of purchase, the caliber, make, model, and manufacturer's number of the weapon, to which shall be added, when sold, the date of sale.

(5) A true record in duplicate shall be made of every pistol, machine gun, sawed-off shotgun, and blackjack sold, said record to be made in a book kept for the purpose, the form of which may be prescribed by the Mayor of the District of Columbia and shall be personally signed by the purchaser and by the person effecting the sale, each in the presence of the other and shall contain the date of sale, the name, address, occupation, color, and place of birth of the purchaser, and, so far as applicable, the caliber, make, model, and manufacturer's number of the weapon, and a statement by the purchaser that the purchaser is not forbidden by § 22-3203 to possess a pistol. One copy of said record shall, within 7 days, be forwarded by mail to the Chief of Police of the District of Columbia and the other copy retained by the seller for 6 years.

(6) No pistol or imitation thereof or placard advertising the sale thereof shall be displayed in any part of said premises where it can readily be seen from the outside. No license to sell at retail shall be granted to anyone except as provided in this section. (July 8, 1932, 47 Stat. 652, ch. 465, § 10; June 29, 1953, 67 Stat. 94, ch. 159, § 204(f), (g); 1973 Ed., § 22-3210; May 21, 1994, D.C. Law 10-119, § 15(i), 41 DCR 1639.)

Section references. — This section is referred to in §§ 22-3203, 22-3209 and 22-3214.

Effect of amendments. — D.C. Law 10-119 inserted "or her" in the introductory language and in (3); and substituted "the purchaser" for "he" preceding "is not forbidden" in (5).

Legislative history of Law 10-119. — See note to § 22-3202.

Change in government. — This section originated at a time when local government powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 401 of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of

the functions of the Board of Commissioners under this section to a single Commissioner. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-211), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-213(a)), appropriate changes in terminology were made in this section.

Cited in *Gaulmon v. United States*, App. D.C., 465 A.2d 847 (1983).

§ 22-3211. False information in purchase of weapons prohibited.

No person shall, in purchasing a pistol or in applying for a license to carry the same, or in purchasing a machine gun, sawed-off shotgun, or blackjack within the District of Columbia, give false information or offer false evidence of his or her identity. (July 8, 1932, 47 Stat. 653, ch. 465, § 11; 1973 Ed., § 22-3211; May 21, 1994, D.C. Law 10-119, § 15(j), 41 DCR 1639.)

Effect of amendments. — D.C. Law 10-119 substituted “his or her” for “his.”

Legislative history of Law 10-119. — See note to § 22-3202.

Cited in Harper v. United States, App. D.C., 608 A.2d 152 (1992).

§ 22-3212. Alteration of identifying marks of weapons prohibited.

No person shall within the District of Columbia change, alter, remove, or obliterate the name of the maker, model, manufacturer’s number, or other mark or identification on any pistol, machine gun, or sawed-off shotgun. Possession of any pistol, machine gun, or sawed-off shotgun upon which any such mark shall have been changed, altered, removed, or obliterated shall be prima facie evidence that the possessor has changed, altered, removed, or obliterated the same within the District of Columbia; provided, however, that nothing contained in this section shall apply to any officer or agent of any of the departments of the United States or the District of Columbia engaged in experimental work. (July 8, 1932, 47 Stat. 653, ch. 465, § 12; 1973 Ed., § 22-3212.)

Inference that possession is evidence of alteration is unconstitutional. — Part of statute which allows inference that possession of a pistol upon which identifying marks have been altered is prima facie evidence that possessor altered identifying marks is unconstitutional. Reid v. United States, App. D.C., 466 A.2d 433 (1983).

Cited in Duddles v. United States, App. D.C., 399 A.2d 59 (1979); United States v. Ward, App. D.C., 438 A.2d 201 (1981); Ruth v. United States, App. D.C., 438 A.2d 1256 (1981); United States v. McCarthy, App. D.C., 448 A.2d 267 (1982); Tillman v. United States, App. D.C., 487 A.2d 1152 (1985).

§ 22-3213. Exceptions.

Except as provided in § 22-3202 and § 22-3214(b), this chapter shall not apply to toy or antique pistols unsuitable for use as firearms. (July 8, 1932, 47 Stat. 653, Ch. 465, § 13; July 29, 1970, 84 Stat. 601, Pub. L. 91-358, title II, § 205(b); 1973 Ed., § 22-3213.)

Cited in Strong v. United States, App. D.C., 581 A.2d 383 (1990).

§ 22-3214. Possession of certain dangerous weapons prohibited; exceptions.

(a) No person shall within the District of Columbia possess any machine gun, sawed-off shotgun, or any instrument or weapon of the kind commonly known as a blackjack, slungshot, sand club, sandbag, switchblade knife, or metal knuckles, nor any instrument, attachment, or appliance for causing the firing of any firearm to be silent or intended to lessen or muffle the noise of the firing of any firearms; provided, however, that machine guns, or sawed-off shotguns, and blackjacks may be possessed by the members of the Army, Navy, Air Force, or Marine Corps of the United States, the National Guard, or Organized Reserves when on duty, the Post Office Department or its employees when on duty, marshals, sheriffs, prison or jail wardens, or their deputies,

policemen, or other duly-appointed law enforcement officers, officers or employees of the United States duly authorized to carry such weapons, banking institutions, public carriers who are engaged in the business of transporting mail, money, securities, or other valuables, wholesale dealers and retail dealers licensed under § 22-3210.

(b) No person shall within the District of Columbia possess, with intent to use unlawfully against another, an imitation pistol, or a dagger, dirk, razor, stiletto, or knife with a blade longer than 3 inches, or other dangerous weapon.

(c) Whoever violates this section shall be punished as provided in § 22-3215 unless the violation occurs after such person has been convicted in the District of Columbia of a violation of this section, or of a felony, either in the District of Columbia or in another jurisdiction, in which case such person shall be imprisoned for not more than 10 years. (July 8, 1932, 47 Stat. 654, ch. 465, § 14; June 29, 1953, 67 Stat. 94, ch. 159, § 204(h); 1973 Ed., § 22-3214; May 21, 1994, D.C. Law 10-119, § 15(k), 41 DCR 1639.)

Section references. — This section is referred to in §§ 9-128, 22-3208, 22-3210 and 22-3213.

Effect of amendments. — D.C. Law 10-119 substituted “such person” for “he” twice in (c).

Legislative history of Law 10-119. — See note to § 22-3202.

References in text. — The Post Office Department, referred to in the proviso in subsection (a) of this section, was abolished and all its functions, powers, and duties were transferred to the United States Postal Service by § 4(a) of the Act of August 12, 1970, 84 Stat. 773, Pub. L. 91-375.

Section is not void for vagueness on the ground that the term “dangerous weapon” is not defined with sufficient particularity. *United States v. Brooks*, App. D.C., 330 A.2d 245 (1974).

Purpose of section. — This section reflects the purpose of Congress to strengthen the existing law and tighten controls over the possession of dangerous weapons. *United States v. Parker*, App. D.C., 185 A.2d 913 (1962).

The legislative desire behind this section was enhanced punishment for possession of weapons. *Jones v. United States*, App. D.C., 401 A.2d 473 (1979).

Section is not intended to cover the whole subject matter of knives in the District. *United States v. Shannon*, App. D.C., 144 A.2d 267 (1958).

Section not a lesser included offense of a federal provision on use of firearm in relation to drug trafficking. — Neither § 22-3204, which requires proof that possession of the firearm involved was unlicensed, nor this section, which includes only offenses involving certain firearms, is a lesser included offense of knowing use of a firearm in relation to a drug trafficking crime, 18 U.S.C. § 924(c)(1). *United States v. Gibbs*, 904 F.2d 52 (D.C. Cir. 1990).

Specific intent element of subsection (b) provides basis for broader defense than the defenses available for general-intent weapons offenses under subsection (a) of this section. *McBride v. United States*, App. D.C., 441 A.2d 644 (1982).

Intent to exercise dominion or control over contraband may be inferred from the presence of contraband in an automobile, in plain view, conveniently accessible to the defendant. In re F.T.J., App. D.C., 578 A.2d 1161 (1990).

Government is not required to bring all knife cases under this section. *Degree v. United States*, App. D.C., 144 A.2d 547 (1958).

Section embraces the possession of a real pistol. *United States v. Parker*, App. D.C., 185 A.2d 913 (1962).

Shotgun must be proved operable. — To prove that an item is a shotgun within the meaning of subsection (a) of this section, the government must prove it operable. *Washington v. United States*, App. D.C., 498 A.2d 247 (1985).

Operability of a weapon can be proved by circumstantial evidence. *Peterson v. United States*, App. D.C., 657 A.2d 756 (1995).

Integral parts of machine gun. — As a matter of law, a magazine need not be deemed an integral part of a machine gun. Whether machine gun with a defective magazine was within the proscription of this section was a jury question. *United States v. Woodfolk*, App. D.C., 656 A.2d 1145 (1995).

Evidence insufficient to prove constructive possession. — Appellant’s conviction on gun charges was overturned where evidence was insufficient to prove constructive possession: an intent to exercise dominion and control over the gun could not be shown where the machine gun protruded less than one inch into

the rear corner of where appellant was sitting, where there was no evidence that appellant had been in the car for a substantial period of time, and where the vehicle had no functional interior light. *In re M.I.W.*, App. D.C., 667 A.2d 573 (1995).

Jurisdiction of Superior Court. — The jurisdiction of the Court of General Sessions (now the Superior Court) extends to a prosecution for possessing a prohibited weapon. *Martin v. United States*, App. D.C., 283 A.2d 448 (1971).

Proof required. — This section demands proof of possession and a specific intent to use a weapon unlawfully against another, but does not require evidence of an attempt to do harm. *Jones v. United States*, App. D.C., 401 A.2d 473 (1979).

The government did not need to prove all the elements of an assault in order to make out a prima facie case of unlawful possession of a knife. *Reid v. United States*, App. D.C., 581 A.2d 359 (1990).

Evidence sufficient to prove that defendant's intent was to use the knife unlawfully. *Reid v. United States*, App. D.C., 581 A.2d 359 (1990).

Defendant "possesses" a gun where he holds it and threatens to shoot it. *Cooke v. United States*, App. D.C., 213 A.2d 508 (1965).

Intent to use unlawfully is a required element in the offense of possession of a dangerous weapon. *United States v. Brooks*, App. D.C., 330 A.2d 245 (1974).

Intent to use a weapon for an unlawful purpose is not an element of the crime defined in subsection (a) of this section. *Worthy v. United States*, App. D.C., 420 A.2d 1216 (1980).

Under certain circumstances the defense of innocent or momentary possession might be applicable to violations of this section, but ordinarily the purpose of the defendant's possession of the weapon is irrelevant. *Worthy v. United States*, App. D.C., 420 A.2d 1216 (1980).

In order to claim defense of innocent or momentary possession, defendant must prove that there was an innocent possession with the intent of ensuring that the newly found weapon would be taken as soon and as directly as possible to law enforcement officers. *Worthy v. United States*, App. D.C., 420 A.2d 1216 (1980).

Double jeopardy plea not valid where informations charge separate offenses. — The plea of double jeopardy was not a valid plea in a new prosecution where the informations charge separate and distinct offenses. *Newman v. United States*, App. D.C., 239 A.2d 152 (1968).

Armed robbery can be committed without also violating this section. *Washington*

v. United States, App. D.C., 366 A.2d 457 (1976).

Assault and possession of a prohibited weapon are separate and distinct offenses. *Jones v. United States*, App. D.C., 401 A.2d 473 (1979).

Proper not to sever shotgun count from trial for stabbing murder. — In a trial for murder in which the victim was stabbed with a knife, the trial court did not err in denying the defendant's motion to sever the count of the indictment charging illegal possession of a sawed-off shotgun, since a reasonable mind could have concluded from the evidence that he had had the shotgun in his possession when he assaulted the deceased and could have used either the gun or the knife in that assault. *Dockery v. United States*, App. D.C., 385 A.2d 767 (1978).

Burden of proof. — In a prosecution for possession of certain prohibited articles, the burden rests on the government to prove beyond a reasonable doubt all elements of the offense. *United States v. Brooks*, App. D.C., 330 A.2d 245 (1974).

Judge should examine drug addict's hospital records pertaining to competency as witnesses. — Where a witness in a prosecution for possession of a prohibited weapon is a long-time drug addict, the judge should examine the locally available hospital records pertaining to the witness' competency. *United States v. Crosby*, 462 F.2d 1201 (D.C. Cir. 1972).

Cross-examination of character witness as to defendant's false pretenses conviction proper. — Where a character witness testifies that the defendant has a good reputation in the community of keeping the peace and good order, cross-examination as to whether he has heard that the defendant has been convicted of the crime of false pretenses is proper. *Darden v. United States*, App. D.C., 342 A.2d 24 (1975).

Where judge visually inspects knife, denying defense's demonstration of length not error. — Where the judge visually inspects a knife and it appears that the blade exceeds the requisite length, denying the defense the opportunity to demonstrate that the blade is not beyond the requisite length is not error. *McIntyre v. United States*, App. D.C., 283 A.2d 814 (1971).

Knife as dangerous weapon. — As length is just one factor to be considered, even a short knife, when wielded by one using it unlawfully, can be dangerous. *Mihav v. United States*, App. D.C., 618 A.2d 197 (1992).

A furniture leg may be a dangerous weapon and its momentary possession supportive of a conviction for possession of a prohibited weapon in violation of this section.

Jones v. United States, App. D.C., 401 A.2d 473 (1979).

Admissible evidence. — Admission of evidence concerning a defendant's previous possession of a sawed-off shotgun would be inadmissible as evidence of other crimes; but where eyewitness testimony that the murder was committed by the defendant with a sawed-off shotgun and that he was in possession of a bag similar to one in which he had previously placed a sawed-off shotgun on the night of the murder, sufficiently connected the sawed-off shotgun to the defendant to make the prior sawed-off shotgun possession relevant to the murder and thus not evidence of other crimes or bad acts. *Ali v. United States*, App. D.C., 581 A.2d 368 (1990), cert. denied, 502 U.S. 893, 112 S. Ct. 259, 116 L. Ed. 2d 213 (1991).

Evidence connecting defendant with a sawed-off shotgun both prior to and on the night of the murder, established a connection between defendant and the gun the witness saw which did not rest upon unwarranted inference, on this basis, was admissible. *Ali v. United States*, App. D.C., 581 A.2d 368 (1990), cert. denied, 502 U.S. 893, 112 S. Ct. 259, 116 L. Ed. 2d 213 (1991).

Question whether wooden table leg is a "dangerous weapon" is for the jury. *United States v. Brooks*, App. D.C., 330 A.2d 245 (1974).

Possession with unlawful intent does not necessarily prove intent-to-frighten assault. — By finding defendant guilty of possession of a prohibited weapon with the intent to use it unlawfully, the jury did not necessarily find that he intended to frighten the complainant and thus to commit intent-to-frighten assault. *McGee v. United States*, App. D.C., 533 A.2d 1268 (1987).

Second charge for possession of prohibited weapon not barred by double jeopardy. — Where the trial judge found that the defendant took possession of a shotgun on 2 separate occasions, the decision to charge him with possession of a prohibited weapon with regard to the first occasion was not barred by double jeopardy as a result of his guilty plea in connection with the second occasion. *Wilson v. United States*, App. D.C., 590 A.2d 1002, cert. denied, 501 U.S. 1257, 111 S. Ct. 2906, 115 L. Ed. 2d 1069 (1991).

Court must determine whether possession was continuous or interrupted. — In cases where possession at any time is prohibited, the court must still consider whether possession was continuous, in which event only 1 offense is properly charged, or whether possession was interrupted and resumed, in which event each resumption of possession would signal the start of a new possessory offense. *Wilson v. United States*, App. D.C., 590 A.2d 1002,

cert. denied, 501 U.S. 1257, 111 S. Ct. 2906, 115 L. Ed. 2d 1069 (1991).

Jury instructions. — The trial court's jury instructions on specific intent and unlawfulness were inadequate where the jury was left to speculate on what was to be considered an unlawful use of a knife against another. *Reid v. United States*, App. D.C., 581 A.2d 359 (1990).

Where a person is charged solely under subsection (b) and the circumstances are ambiguous as to the particular unlawful use allegedly intended by a defendant, more explicit instructions are required in order to avoid jury speculation, the trial court is required to give an instruction further defining the term "unlawful." *Reid v. United States*, App. D.C., 581 A.2d 359 (1990).

Incomplete flight instruction not plain error. — In a prosecution for possession of a prohibited weapon, an incomplete instruction on flight does not constitute plain error. *Woody v. United States*, App. D.C., 369 A.2d 592 (1977).

Defense of self-defense instruction. — Trial court erred by failing to instruct the jury that the defense of self-defense applied to the charge of possession of a prohibited weapon, and by refusing to respond to a jury note asking whether the self-defense instruction applied to that charge. *Potter v. United States*, App. D.C., 534 A.2d 943 (1987).

Although an instruction explaining the term "unlawful" will not be a universal requirement in cases under subsection (b), it ordinarily will be required when a charge under subsection (b) stands alone. *Reid v. United States*, App. D.C., 581 A.2d 359 (1990).

Where a defendant charged with possession of a prohibited weapon defended on the basis that he and others were merely playing with knives, he was not precluded from also having the issue of self-defense put to the jury where there was sufficient evidence to support his claim in that he was engaged in an argument with several others which could have indicated he was outnumbered and warding off an attack and where he made a comment to the arresting officer that could be construed to mean that he was prepared to defend himself with the knife if the others attacked him. *Reid v. United States*, App. D.C., 581 A.2d 359 (1990).

Defense of property instruction. — Defendant was not entitled to a jury instruction on the defense of property where there was no factual basis to support the instruction because evidence at trial showed that he had fired the pistol not to repossess property, but to vindicate a principle. *Doby v. United States*, App. D.C., 550 A.2d 919 (1988).

Evidence tending to negate unlawful intent. — Evidence tending to prove that the

defendant had a weapon for a permissible purpose tends to negate government evidence of unlawful intent. *McBride v. United States*, App. D.C., 441 A.2d 644 (1982).

Immunity under § 6-2375 would not afford protection to a defendant also charged under D.C. Code § 22-3204 and this section. *Stein v. United States*, App. D.C., 532 A.2d 641 (1987), cert. denied, 485 U.S. 1010, 108 S. Ct. 1477, 99 L. Ed. 2d 705 (1988).

Evidence sufficient to sustain conviction. — The possession of weapons in a car in which the defendants were riding, which can be knowledgeably attributable to the defendants, is sufficient to sustain their convictions for possession of prohibited weapons. *United States v. Matthews*, 480 F.2d 1191 (D.C. Cir. 1973).

Fact that the protruding end of a machine gun lay unconcealed at defendant's feet and so close to him that, as the trial judge observed, he would have virtually kicked it during the 15 to 20 minutes he was in the car, and additional circumstances relied on by the trial judge, were sufficient to support finding of constructive possession. *In re F.T.J.*, App. D.C., 578 A.2d 1161 (1990).

Evidence supported the trial court's finding that defendant had the intention to do the acts which constituted the carrying of a deadly or dangerous weapon, and that his purpose in carrying the weapon was its use as such. *Mihis v. United States*, App. D.C., 618 A.2d 197 (1992).

Evidence sufficient to support convictions for possession of a prohibited weapon, felony murder and burglary. *Marshall v. United States*, App. D.C., 623 A.2d 551 (1992).

Evidence of prior possession of a dangerous weapon. — Evidence of possession of a weapon on an earlier occasion by one later charged with using a similar weapon is probative, relevant evidence. *Marshall v. United States*, App. D.C., 623 A.2d 551 (1992).

Assault acquittal does not require possession acquittal. — An acquittal of assault with a dangerous weapon does not require an acquittal of carrying a pistol. *Cooke v. United States*, 275 F.2d 887 (D.C. Cir. 1960).

And vice versa. — Finding that the defendant is not guilty of the possession of a nightstick does not necessarily preclude a conviction of simple assault. *Matthews v. United States*, App. D.C., 267 A.2d 826 (1970), cert. denied, 404 U.S. 884, 92 S. Ct. 221, 30 L. Ed. 2d 166 (1971).

Conviction of possession of prohibited weapon does not merge into armed robbery conviction. *Woody v. United States*, App. D.C., 369 A.2d 592 (1977); *Jones v. United States*, App. D.C., 516 A.2d 929 (1986), cert. denied, 481 U.S. 1054, 107 S. Ct. 2193, 95 L. Ed. 2d 848 (1987).

Convictions of both assault and possession do not result in double jeopardy. *Walden v. United States*, App. D.C., 351 A.2d 515 (1976).

And consecutive sentences proper. — Consecutive sentences are properly imposed on a defendant convicted of simple assault and possession of a prohibited weapon. *Cooke v. United States*, App. D.C., 213 A.2d 508 (1965).

Section does not mandatorily require the prosecution of a "repeater." *Martin v. United States*, App. D.C., 283 A.2d 448 (1971).

Prosecution lacks authority to charge defendant under § 22-104 as a "general" repeat offender for carrying a dangerous weapon and possessing a prohibited weapon. *Martin v. United States*, App. D.C., 283 A.2d 448 (1971).

Cited in *Rucker v. United States*, 280 F.2d 623 (D.C. Cir. 1960); *Willis v. United States*, App. D.C., 250 A.2d 569 (1969); *Burrell v. United States*, App. D.C., 252 A.2d 897 (1969); *Dupont v. United States*, App. D.C., 259 A.2d 355 (1969); *United States v. Bailey*, 426 F.2d 1236 (D.C. Cir. 1970); *Jackson v. United States*, App. D.C., 262 A.2d 106 (1970); *Herring v. United States*, App. D.C., 273 A.2d 835 (1971); *United States v. McKinney*, 477 F.2d 1184 (D.C. Cir. 1973); *United States v. Coates*, 495 F.2d 160 (D.C. Cir. 1974); *United States v. Thorne*, 527 F.2d 840 (D.C. Cir. 1975); *Walden v. United States*, App. D.C., 351 A.2d 515 (1976); *White v. United States*, App. D.C., 358 A.2d 645 (1976); *Epstein v. United States*, App. D.C., 359 A.2d 274 (1976); *Jacobs v. United States*, App. D.C., 374 A.2d 850 (1977); *United States v. Perkins*, App. D.C., 374 A.2d 882 (1977); *Pittman v. United States*, App. D.C., 375 A.2d 16 (1977); *Frezzell v. United States*, App. D.C., 380 A.2d 1382 (1977), cert. denied, 439 U.S. 931, 99 S. Ct. 319, 58 L. Ed. 2d 324 (1978); *United States v. Bolden*, App. D.C., 381 A.2d 624 (1977); *Allen v. United States*, App. D.C., 383 A.2d 363 (1978); *McBride v. United States*, App. D.C., 393 A.2d 123 (1978), cert. denied, 440 U.S. 927, 99 S. Ct. 1260, 59 L. Ed. 2d 482 (1979); *United States v. Henry*, 600 F.2d 924 (D.C. Cir. 1979); *Duddles v. United States*, App. D.C., 399 A.2d 59 (1979); *Hill v. United States*, App. D.C., 404 A.2d 525 (1979), cert. denied, 444 U.S. 1085, 100 S. Ct. 1042, 62 L. Ed. 2d 770 (1980); *Tabron v. United States*, App. D.C., 410 A.2d 209 (1979); *Cosgrove v. United States*, App. D.C., 411 A.2d 57 (1980); *Rogers v. United States*, App. D.C., 419 A.2d 977 (1980); *Allen v. United States*, App. D.C., 431 A.2d 27 (1981); *Hawkins v. United States*, App. D.C., 434 A.2d 446 (1981); *Hilton v. United States*, App. D.C., 435 A.2d 383 (1981); *Smith v. District of Columbia*, App. D.C., 436 A.2d 53 (1981); *United States v. Ward*, App. D.C., 438 A.2d 201 (1981); *United States v. Russell*, 686 F.2d 35 (D.C. Cir. 1982); *Jackson v. United States*, App. D.C., 441 A.2d

1000 (1982); Keitt v. United States, App. D.C., 450 A.2d 461 (1982); United States v. Foster, 566 F. Supp. 1403 (D.D.C. 1983); In re S.P., App. D.C., 465 A.2d 823 (1983); Haynesworth v. United States, App. D.C., 473 A.2d 366 (1984); Allen v. United States, App. D.C., 495 A.2d 1145 (1985); Hairston v. United States, App. D.C., 497 A.2d 1097 (1985); Groves v. United States, App. D.C., 504 A.2d 602 (1986); Snipes v. United States, App. D.C., 507 A.2d 159 (1986); Ford v. Turner, App. D.C., 531 A.2d 233 (1987); Murray v. United States, App. D.C., 532 A.2d 120 (1987); United States v. Duncan, 115 WLR 2517 (Super. Ct. 1987); Sturdivant v. United States, App. D.C., 551 A.2d 1338 (1988), cert. denied, 493 U.S. 956, 110 S. Ct. 370, 107 L. Ed. 2d 356 (1989); Franklin v. United States, App. D.C., 555 A.2d 1010 (1989); Townsend v. United States, App. D.C., 559 A.2d 1319 (1989); Alvarez v. United States, App. D.C., 576 A.2d 713, cert. denied, 498 U.S. 875, 111 S. Ct. 203,

112 L. Ed. 2d 164 (1990); Strong v. United States, App. D.C., 581 A.2d 383 (1990); Edwards v. United States, App. D.C., 583 A.2d 661 (1990); United States v. Smith, 118 WLR 2277 (Super. Ct. 1990); Washington v. United States, App. D.C., 585 A.2d 167 (1991); Ingram v. United States, App. D.C., 592 A.2d 992, cert. denied, 502 U.S. 1017, 112 S. Ct. 667, 116 L. Ed. 2d 757 (1991); Freeman v. United States, App. D.C., 600 A.2d 1070 (1991); United States v. Wood, 981 F.2d 536 (D.C. Cir. 1992); White v. United States, App. D.C., 613 A.2d 869 (1992); Halicki v. United States, App. D.C., 614 A.2d 499 (1992); Etheredge v. District of Columbia, 120 WLR 2225 (Super. Ct. 1992); Edwards v. United States, App. D.C., 619 A.2d 33 (1993); Durso v. Taylor, App. D.C., 624 A.2d 449 (1993); Etheredge v. District of Columbia, App. D.C., 635 A.2d 908 (1993); United States v. Maiden, 870 F. Supp. 359 (D.D.C. 1994); United States v. Holiday, Etc., 123 WLR 1957 (Super. Ct. 1995).

§ 22-3215. Penalties.

Any violation of any provision of this chapter for which no penalty is specifically provided shall be punished by a fine of not more than \$1,000 or imprisonment for not more than 1 year, or both. (July 8, 1932, 47 Stat. 654, ch. 465, § 15; 1973 Ed., § 22-3215.)

Section references. — This section is referred to in §§ 22-3203, 22-3204 and 22-3214.

Heavier penalty for subsequent offenses constitutional. — A state legislature does not violate the equal protection provision of the Fourteenth Amendment in enacting statutes which impose a heavier penalty for subsequent offenses. Kendrick v. United States, 238 F.2d 34 (D.C. Cir. 1956).

Procedural standards to be observed in imposing increased punishment include reasonable notice of the recidivist charge, the opportunity to be heard, the right to counsel, and proof of the prior conviction. United States v. Clemons, 440 F.2d 205 (D.C. Cir. 1970), cert. denied, 401 U.S. 945, 91 S. Ct. 959, 28 L. Ed. 2d 227 (1971).

Absence of allegation or proof of previous conviction precludes not greater penalty. — The failure of the pistol-carrying count of the indictment to allege or prove that the defendant has been previously convicted of a felony does not necessarily preclude the imposition of a greater penalty. Kendrick v. United States, 238 F.2d 34 (D.C. Cir. 1956).

But where no mention nor proof of conviction, increased sentence improper. — Where there is no mention of a prior conviction and there is no proof of such a conviction in the presence of the defendant, the imposition of an increased sentence is improper. United States

v. Marshall, 440 F.2d 195 (D.C. Cir.), cert. denied, 400 U.S. 909, 91 S. Ct. 153, 27 L. Ed. 2d 148 (1970).

And defense counsel's stipulation of felony no waiver of proof. — Where the defendant's counsel stipulates that the defendant has previously been convicted of a felony and waives proof thereof, without the defendant's knowledge or consent, there is no waiver of proof. Jackson v. United States, 221 F.2d 883 (D.C. Cir. 1955).

Sentence of 360 days for carrying pistol without a license is legally permissible. Gillard v. United States, App. D.C., 202 A.2d 776 (1964).

Sentence not unduly severe. — A sentence of not less than 3 nor more than 10 years is not unduly severe for carrying a deadly weapon after prior convictions of house breaking, grand larceny and receiving stolen property and where the defendant failed to consistently report back to jail between the entry of his guilty plea and his sentencing. Barnett v. United States, 403 F.2d 918 (D.C. Cir. 1968).

Legally permissible sentence is not subject to review or control by appellate court. Gillard v. United States, App. D.C., 202 A.2d 776 (1964).

Cited in Brewster v. United States, App. D.C., 271 A.2d 409 (1970); Scott v. United States, App. D.C., 392 A.2d 4 (1978); Henson v.

United States, App. D.C., 399 A.2d 16, cert. denied, 444 U.S. 848, 100 S. Ct. 96, 62 L. Ed. 2d 62 (1979); Jackson v. United States, App. D.C., 498 A.2d 185 (1985); Ford v. Turner, App. D.C.,

531 A.2d 233 (1987); Shepard v. United States, App. D.C., 538 A.2d 1115 (1988); Ray v. United States, App. D.C., 620 A.2d 860 (1993).

§ 22-3215a. Manufacture, transfer, use, possession, or transportation of molotov cocktails, or other explosives for unlawful purposes, prohibited; definitions; penalties.

(a) No person shall within the District of Columbia manufacture, transfer, use, possess, or transport a molotov cocktail. As used in this subsection, the term “molotov cocktail” means: (1) a breakable container containing flammable liquid and having a wick or a similar device capable of being ignited; or (2) any other device designed to explode or produce uncontained combustion upon impact; but such term does not include a device lawfully and commercially manufactured primarily for the purpose of illumination, construction work, or other lawful purpose.

(b) No person shall manufacture, transfer, use, possess, or transport any device, instrument, or object designed to explode or produce uncontained combustion, with the intent that the same may be used unlawfully against any person or property.

(c) No person shall, during a state of emergency in the District of Columbia declared by the Mayor pursuant to law, or during a situation in the District of Columbia concerning which the President has invoked any provision of Chapter 15 of Title 10, United States Code, manufacture, transfer, use, possess, or transport any device, instrument, or object designed to explode or produce uncontained combustion, except at his or her residence or place of business.

(d) Whoever violates this section shall: (1) for the first offense, be sentenced to a term of imprisonment of not less than 1 and not more than 5 years; (2) for the second offense, be sentenced to a term of imprisonment of not less than 3 and not more than 15 years; and (3) for the third or subsequent offense, be sentenced to a term of imprisonment of not less than 5 years and of any term of years up to life imprisonment. In the case of a person convicted of a third or subsequent violation of this section, Chapter 402 of Title 18, United States Code (Federal Youth Corrections Act) shall not apply. (July 8, 1932, 47 Stat. 654, ch. 465, § 15A; July 29, 1970, 84 Stat. 603, Pub. L. 91-358, title II, § 209; 1973 Ed., § 22-3215a; May 21, 1994, D.C. Law 10-119, § 15(l), 41 DCR 1639.)

Effect of amendments. — D.C. Law 10-119 substituted “his or her” for “his” in (c).

Legislative history of Law 10-119. — See note to § 22-3202.

References in text. — “Chapter 15 of Title 10, United States Code,” referred to in (c), is codified at 10 U.S.C. § 331, et seq.

“Chapter 402 of Title 18, United States Code (Federal Youth Correction Act),” referred to in subsection (d), was repealed effective October

12, 1984, by 98 Stat. 2027, Pub. L. 98-473, with delayed effective dates in certain cases.

Change in government. — This section originated at a time when local government powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 401 of Reorganization Plan No. 3 of 1967 (see Reorga-

nization Plans in Volume 1) transferred all of the functions of the Board of Commissioners under this section to a single Commissioner. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-211), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-213(a)), appropriate changes in terminology were made in this section.

“Molotov cocktails” are included within term “destructive devices” under the National Firearms Act. *United States v. Cruz*, 492 F.2d 217 (2nd Cir.), cert. denied, 417 U.S. 935, 94 S. Ct. 2649, 41 L. Ed. 2d 239 (1974).

Possession of “molotov cocktail” not presumed from possession of recently stolen rifles. — The presumed fact of arson, possession of a “molotov cocktail” and second-degree burglary while armed with a molotov cocktail does not flow from the possession of recently stolen military rifles. *United States v. Carter*, 522 F.2d 666 (D.C. Cir. 1975).

Cited in *Washington v. United States*, App. D.C., 498 A.2d 247 (1985).

§ 22-3216. Severability.

If any part of this chapter is for any reason declared void, such invalidity shall not affect the validity of the remaining portions of this chapter. (July 8, 1932, 47 Stat. 654, ch. 465, § 16; 1973 Ed., § 22-3216.)

Cited in *Ford v. Turner*, App. D.C., 531 A.2d 233 (1987).

§ 22-3217. Dangerous articles; definition; taking and destruction; procedure.

(a) As used in this section, the term “dangerous article” means:

(1) Any weapon such as a pistol, machine gun, sawed-off shotgun, blackjack, slingshot, sandbag, or metal knuckles; or

(2) Any instrument, attachment, or appliance for causing the firing of any firearms to be silent or intended to lessen or muffle the noise of the firing of any firearms.

(b) A dangerous article unlawfully owned, possessed, or carried is hereby declared to be a nuisance.

(c) When a police officer, in the course of a lawful arrest or lawful search, discovers a dangerous article which the officer reasonably believes is a nuisance under subsection (b) of this section the officer shall take it into his or her possession and surrender it to the Property Clerk of the Metropolitan Police Department.

(d)(1) Within 30 days after the date of such surrender, any person may file in the office of the Property Clerk of the Metropolitan Police Department a written claim for possession of such dangerous article. Upon the expiration of such period, the Property Clerk shall notify each such claimant, by registered mail addressed to the address shown on the claim, of the time and place of a hearing to determine which claimant, if any, is entitled to possession of such dangerous article. Such hearing shall be held within 60 days after the date of such surrender.

(2) At the hearing the Property Clerk shall hear and receive evidence with respect to the claims filed under paragraph (1) of this subsection. Thereafter he or she shall determine which claimant, if any, is entitled to possession of such

dangerous article and shall reduce his or her decision to writing. The Property Clerk shall send a true copy of such written decision to each claimant by registered mail addressed to the last known address of such claimant.

(3) Any claimant may, within 30 days after the day on which the copy of such decision was mailed to such claimant, file an appeal in the Superior Court of the District of Columbia. If the claimant files an appeal, he or she shall at the same time give written notice thereof to the Property Clerk. If the decision of the Property Clerk is so appealed, the Property Clerk shall not dispose of the dangerous article while such appeal is pending and, if the final judgment is entered by such court, he or she shall dispose of such dangerous article in accordance with the judgment of such court. The Superior Court of the District of Columbia is authorized to determine which claimant, if any, is entitled to possession of the dangerous article and to enter a judgment ordering a disposition of such dangerous article consistent with subsection (f) of this section.

(4) If there is no such appeal, or if such appeal is dismissed or withdrawn, the Property Clerk shall dispose of such dangerous article in accordance with subsection (f) of this section.

(5) The Property Clerk shall make no disposition of a dangerous article under this section, whether in accordance with his or her own decision or in accordance with the judgment of the Superior Court of the District of Columbia, until the United States Attorney for the District of Columbia certifies to the Property Clerk that such dangerous article will not be needed as evidence.

(e) A person claiming a dangerous article shall be entitled to its possession only if: (1) such person shows, on satisfactory evidence, that such person is the owner of the dangerous article or is the accredited representative of the owner, and that the ownership is lawful; (2) such person shows on satisfactory evidence that at the time the dangerous article was taken into possession by a police officer it was not unlawfully owned and was not unlawfully possessed or carried by the claimant or with his or her knowledge or consent; and (3) the receipt of possession by the claimant does not cause the article to be a nuisance. A representative is accredited if such person has a power of attorney from the owner.

(f) If a person claiming a dangerous article is entitled to its possession as determined under subsections (d) and (e) of this section, possession of such dangerous article shall be given to such person. If no person so claiming is entitled to its possession as determined under subsections (d) and (e) of this section, or if there be no claimant, such dangerous article shall be destroyed. In lieu of such destruction, any such serviceable dangerous article may, upon order of the Mayor of the District of Columbia, be transferred to and used by any federal or District Government law-enforcing agency, and the agency receiving same shall establish property responsibility and records of these dangerous articles.

(g) The Property Clerk shall not be liable in damages for any action performed in good faith under this section. (July 8, 1932, ch. 465, § 18; Feb. 20, 1952, 66 Stat. 8, ch. 47, § 1; July 29, 1970, 84 Stat. 570, Pub. L. 91-358, title

I, § 155(a); 1973 Ed., § 22-3217; May 21, 1994, D.C. Law 10-119, § 15(m), 41 DCR 1639.)

Cross references. — As to return of property by Property Clerk, see § 4-157.

Effect of amendments. — D.C. Law 10-119 substituted “the officer” for “he” twice in (c); inserted “or she” in (d)(2) and twice in (d)(3); inserted “or her” in (c), (d)(2), (d)(5), and (e); substituted “the Property Clerk” for “him” near the end of (d)(5); and in (e), substituted “the claimant” for “him” in (3) and substituted “such person” for “he” throughout.

Legislative history of Law 10-119. — See note to § 22-3202.

Change in government. — This section originated at a time when local government powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 401 of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of the functions of the Board of Commissioners under this section to a single Commissioner. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat.

818, § 711 (D.C. Code, § 1-211), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-213(a)), appropriate changes in terminology were made in this section.

Prohibition on transfer of ammunition feeding devices. — See notes to § 22-3208.

Constitutionality. — This statute is premised on a sometimes fallacious assumption that any possible claimant of seized property will—somehow—have constitutionally adequate notice of the seizure and can make a timely claim. *Ford v. Turner*, App. D.C., 531 A.2d 233 (1987).

Review by court of determination by Property Clerk under § 4-157 is de novo. *Kuhn v. Cissel*, App. D.C., 409 A.2d 182 (1979).

Cited in *Palmer v. United States*, 203 F.2d 66 (D.C. Cir. 1953); *Patterson v. District of Columbia*, 117 WLR 741 (Super. Ct. 1989).

CHAPTER 33. VAGRANCY.

Sec.	Sec.
22-3301. [Repealed].	22-3304. Penalty; conditions imposed by court.
22-3302. "Vagrants" defined.	22-3305. Prosecutions.
22-3303. Prosecutions; burden of proof to show lawful employment.	22-3306. Right to strike or picket not abrogated.

§ 22-3301. "Vagrancy" defined; prosecution and the giving of security.

Repealed. Dec. 17, 1941, 55 Stat. 810, ch. 589, § 5.

§ 22-3302. "Vagrants" defined.

The following classes of persons shall be deemed vagrants in the District of Columbia:

(1) Any person known to be a pickpocket, thief, burglar, confidence operator, or felon, either by his or her own confession or by his or her having been convicted in the District of Columbia or elsewhere of any one of such offenses or of any felony, and having no lawful employment and having no lawful means of support realized from a lawful occupation or source, and not giving a good account of himself or herself when found loitering around in any park, highway, public building, or other public place, store, shop, or reservation, or at any public gathering or assembly;

(2) Any person leading an immoral or profligate life who has no lawful employment and who has no lawful means of support realized from a lawful occupation or source;

(3) Any person who keeps, operates, frequents, lives in, or is employed in any house or other establishment of ill fame, or who (whether married or single) engages in or commits acts of fornication or perversion for hire;

(4) Any person who frequents or loafs, loiters, or idles in or around or is the occupant of or is employed in any gambling establishment or establishment where intoxicating liquor is sold without a license;

(5) Any person wandering abroad and lodging in any grocery or provision establishment, vacant house, or other vacant building, outhouse, market place, shed, barn, garage, gasoline station, parking lot, or in the open air, and not giving a good account of himself or herself;

(6) [Repealed];

(7) Any person who wanders about the streets at late or unusual hours of the night without any visible or lawful business and not giving a good account of himself or herself; and

(8) All persons who by the common law are vagrants, whether embraced in any of the foregoing classifications or not. (Dec. 17, 1941, 55 Stat. 808, ch. 589, § 1; June 29, 1953, 67 Stat. 97, ch. 159, § 209(b); 1973 Ed., § 22-3302; Nov. 17, 1993, D.C. Law 10-54, § 9, 40 DCR 5450; May 21, 1994, D.C. Law 10-119, § 16(a), 41 DCR 1639; _____, 1996, D.C. Law 11- (Act 11-198), § 5, 43 DCR 528.)

Section references. — This section is referred to in §§ 22-3203 and 22-3303 to 22-3306.

Effect of amendments. — D.C. Law 10-119 inserted “or her” twice in (1); and inserted “or herself” in (1), (5), and (7).

D.C. Law 11- (Act 11-198) validated a previously made change at the end of (7).

Legislative history of Law 10-54. — Law 10-54, the “Panhandling Control Act of 1993,” was introduced in Council and assigned Bill No. 10-72, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on June 1, 1993, and June 29, 1993, respectively. Signed by the Mayor on July 16, 1993, it was assigned Act No. 10-48 and transmitted to both Houses of Congress for its review. D.C. Law 10-54 became effective on November 17, 1993.

Legislative history of Law 10-119. — Law 10-119, the “Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Legislative history of Law 11- (Act 11-198). — Law 11- (Act 11-198), the “Criminal Code Technical Amendments Act of 1996,” was introduced in Council and assigned Bill No. 11-484, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on December 5, 1995, and January 4, 1996, respectively. Signed by the Mayor on January 26, 1996, it was assigned Act No. 11-198 and transmitted to both Houses of Congress for its review. D.C. Law 11- (Act 11-198) is projected to become law on May 16, 1996.

Section unconstitutional. — Since the term “loitering,” as used in this section, fails to supply the necessary statutory criteria by which one can objectively distinguish lawful from unlawful conduct, this section is unconstitutional. *Ricks v. District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968).

The phrase “not giving a good account of himself,” as used in this section, is much too loose to satisfy constitutional requirements. *Ricks v. District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968).

This section grants unfettered discretion to administrative and judicial authorities and is thus invalid. *Ricks v. District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968).

The phrase “leading an immoral and profligate life,” as used in this section, necessitates so much guesswork as to its coverage as to render

this section invalid. *Ricks v. District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968).

But allegedly improper policy vagrancy observation practices furnish no basis for federal jurisdiction by virtue of the civil rights statute giving rise to a cause of action for a deprivation of rights under color of law. *Gomez v. Wilson*, 477 F.2d 411 (D.C. Cir. 1973).

Words “immoral or profligate life” are not too vague and uncertain. *Hicks v. District of Columbia*, App. D.C., 197 A.2d 154 (1964).

Nature of vagrancy. — “Vagrancy” is a status or condition and this section punishes one for being a certain kind of person, not for doing of an overt act. *Hunt v. District of Columbia*, App. D.C., 47 A.2d 783 (1946), *aff’d*, 163 F.2d 833 (D.C. Cir. 1947).

This section denounces and makes punishable being in a state of vagrancy rather than the particular conduct enumerated in this section as evidencing or characterizing such a condition. *District of Columbia v. Hunt*, 163 F.2d 833 (1947).

“Vagrancy” consists of a continuing course of immorality or a pattern of iniquity, rather than a solitary instance of wrongdoing. *Coley v. District of Columbia*, App. D.C., 177 A.2d 889 (1962); *Golden v. District of Columbia*, App. D.C., 210 A.2d 2 (1965).

A vagrancy conviction cannot stand without evidence of a course of conduct or mode of living, or a status prejudicial to the public welfare. *Drew v. District of Columbia*, App. D.C., 187 A.2d 325 (1963).

This section does not make criminal the status or condition of poverty and unemployment. *Hicks v. District of Columbia*, App. D.C., 197 A.2d 154 (1964).

Purpose of section. — The purpose of this section is to prevent the crime likely to flow from a vagrant’s mode of life. *District of Columbia v. Hunt*, 163 F.2d 833 (D.C. Cir. 1947); *Harris v. District of Columbia*, App. D.C., 192 A.2d 814 (1963).

Vagrancy statutes are designed to prevent crime. *Beal v. District of Columbia*, App. D.C., 82 A.2d 765 (1951), *rev’d* on other grounds, 201 F.2d 176 (D.C. Cir. 1952).

It is not the purpose of this section to deprive persons of the use of public sidewalks, so long as they are used either for the legitimate purpose of pleasure or business. *Harris v. District of Columbia*, App. D.C., 132 A.2d 152 (1957), *rev’d* on other grounds, 251 F.2d 913 (1958).

Section must be construed narrowly in favor of the defendant. *Harris v. District of Columbia*, 251 F.2d 913 (D.C. Cir. 1958); *Johnson v. District of Columbia*, App. D.C., 230 A.2d 483 (1967).

Section is in the nature of a police regulation to prevent crime. *Clark v. District of Columbia*, App. D.C., 34 A.2d 711 (1943).

Section is not to be construed as a curfew law. *Beail v. District of Columbia, App. D.C., 82 A.2d 765 (1951), rev'd on other grounds, 201 F.2d 176 (D.C. Cir. 1952).*

Nor as bar to social intercourse for convicted persons. — This section should not be so construed as to bar from society or intercourse with other human beings persons who have been convicted of a crime and have served the sentence imposed. *Clark v. District of Columbia, App. D.C., 34 A.2d 711 (1943).*

To convict under this section, it must be shown that the defendant was found prowling around one of the public places mentioned in this section, and that he was doing so while having no visible and lawful means of support, and that he was a person known to be pickpocket, thief or burglar. *Clark v. District of Columbia, App. D.C., 34 A.2d 711 (1943).*

"Thief" does not cover person who has been guilty only of unauthorized borrowing. *Harris v. District of Columbia, 251 F.2d 913 (D.C. Cir. 1958).*

One is "known" as pickpocket, etc., only by conviction or confession. — One can come within the purview of this section only if he is "known" to be a pickpocket, etc., by either a conviction or a confession. *Ferguson v. District of Columbia, App. D.C., 208 A.2d 96 (1965).*

Evidence of prior criminal convictions is required to establish vagrancy. *Riley v. District of Columbia, App. D.C., 207 A.2d 121 (1965).*

Vagrancy conviction possible notwithstanding lawful means of support. — A defendant can be guilty of vagrancy under this section notwithstanding the fact that she might be a person of fixed abode having a lawful means of support. *Beail v. District of Columbia, App. D.C., 82 A.2d 765 (1951), rev'd on other grounds, 201 F.2d 176 (D.C. Cir. 1952).*

Person found loitering has the duty to give a good account of himself. *Kelley v. United States, 298 F.2d 310 (D.C. Cir. 1961).*

"Not giving a good account of himself" defined. — "Not giving a good account of himself" means not giving a good account upon an order or a demand to explain one's presence in the street. *Beail v. District of Columbia, 201 F.2d 176 (D.C. Cir. 1952).*

Where no demand to explain presence, conviction reversed. — In a prosecution for vagrancy, where the defendant was not confronted with an order or demand to explain her presence in the street, her conviction will be reversed. *Beail v. District of Columbia, 201 F.2d 176 (D.C. Cir. 1952).*

But no right to demand account because of unusual hour. — Officers of the law have no right to compel one to account for his actions merely because he is on the street at an unusual hour. *Beail v. District of Columbia, App.*

D.C., 82 A.2d 765 (1951), rev'd on other grounds, 201 F.2d 176 (D.C. Cir. 1952).

And where loitering lacking, no misdemeanor committed. — Where the element of loitering about a public place is lacking, there is no misdemeanor committed. *Curtis v. United States, App. D.C., 222 A.2d 840 (1966).*

One standing on platform for primary purpose of picking a pocket is loitering within the meaning of this section. *Williams v. District of Columbia, App. D.C., 65 A.2d 924 (1949).*

Evidence establishing loitering. — In a prosecution for vagrancy, evidence that the defendant was moving about after midnight in a crowd on a loading platform at a bus terminal and that he was observed mingling with crowds on a loading platform at another bus terminal on other occasions on the same night establishes that he was "loitering." *Burns v. District of Columbia, App. D.C., 34 A.2d 714 (1943).*

And leading "immoral or profligate life." — Evidence that the defendant offered girls money to commit an immoral act, that he looked into a window of a girls' dormitory, that he entered a women's restroom, and that he sold liquor without a license is sufficient to establish that he led an "immoral or profligate life." *Davenport v. District of Columbia, App. D.C., 61 A.2d 486 (1948).*

And "frequenting" house of ill fame. — The defendant's admission that she was "living" at the premises which is shown to be a house of ill fame is sufficient to establish her guilt of "frequenting" such an establishment. *Wilson v. District of Columbia, App. D.C., 65 A.2d 214 (1949).*

"Without any visible or lawful business" defined. — "Without any visible and lawful business" does not refer to the ordinary vocation of a person, but has reference to the purpose of being on the street. *Beail v. District of Columbia, App. D.C., 82 A.2d 765 (1951), rev'd on other grounds, 201 F.2d 176 (D.C. Cir. 1952).*

Previous prosecutions not precluding vagrancy prosecution. — Previous prosecutions for disorderly conduct, indecent exposure, solicitation to prostitution, violation of the A.B.C. Laws, and drinking in public, does not preclude a subsequent prosecution for vagrancy. *Davenport v. District of Columbia, App. D.C., 61 A.2d 486 (1948).*

Mere hunch of criminal activity no justification for detention. — A mere hunch of criminal activity will not justify a police officer in making a detention for investigatory purposes. *Gomez v. Wilson, 323 F. Supp. 87 (D.D.C. 1971), modified, 477 F.2d 411 (D.C. Cir. 1973).*

But police officer who recognizes a professional pickpocket is authorized to question him. *Clark v. District of Columbia, App. D.C., 34 A.2d 711 (1943).*

Search incident to arrest not limited to frisk. — Although it is incident to an arrest for vagrancy, a search is not for that reason required to be limited to a frisk. *Worthy v. United States*, 409 F.2d 1105 (D.C. Cir. 1968).

Where defendant is unlawfully arrested for vagrancy, he has a right to raise his voice in protest and cannot be arrested for disorderly conduct. *Curtis v. United States*, App. D.C., 222 A.2d 840 (1966).

Defendant's statement to a police officer is normally admitted in a vagrancy prosecution, absent a showing that the statement was other than completely voluntary and spontaneous or that it was sought or elicited in response to police interrogation. *Golden v. District of Columbia*, App. D.C., 210 A.2d 2 (1965).

Informations charging vagrancies during separate periods charge separate crimes. — Where a defendant is charged with vagrancy in consecutive informations and each information charges vagrancy during a separate period, each information charges a separate crime, not a single continuing one. *Thomas v. District of Columbia*, App. D.C., 161 A.2d 52 (1960).

Consolidation error where no conspiracy or joint commission. — Where there is no conspiracy or joint commission of a crime, granting a consolidation against all defendants is error. *Hunt v. District of Columbia*, App. D.C., 47 A.2d 783 (1946), *aff'd*, 163 F.2d 833 (D.C. Cir. 1947).

Untimely severance request deemed waived. — Where prosecutions for disorderly conduct and vagrancy are consolidated for trial, an untimely severance request will be deemed waived. *Riley v. District of Columbia*, App. D.C., 207 A.2d 121 (1965).

Government not required to prove occupants of house of ill fame previously convicted. — In a vagrancy prosecution against a defendant charged with frequenting houses of ill fame, the government is not required to prove that the occupants of the house previously arrested were duly convicted in court. *Fields v. District of Columbia*, App. D.C., 77 A.2d 563 (1950).

Defendant's admission of criminal record satisfies prosecution's burden of proof. — In a prosecution for vagrancy, the defendant's admission of the accuracy of his criminal record produced by the prosecution satisfies the burden of proof. *Burns v. District of Columbia*, App. D.C., 34 A.2d 714 (1943).

Burden of proving lawful means of support arises upon proof of other elements. — The burden of a defendant charged with vagrancy of proving a lawful means of support does not arise until the prosecution has proven the other elements of the offense. *Baker v. District of Columbia*, App. D.C., 184 A.2d 198 (1962).

In a vagrancy prosecution, the defendant is not entitled to a jury trial. *Rogers v. District of Columbia*, App. D.C., 31 A.2d 649 (1943).

Continuance matter of court's discretion. — In a prosecution for vagrancy, the continuance of the trial at the request of the prosecution is a matter in the discretion of the court. *Burns v. District of Columbia*, App. D.C., 34 A.2d 714 (1943).

Admissible evidence. — In a vagrancy prosecution, the testimony of the arresting officer regarding the character of certain women with whom the defendant had been seen is admissible. *Rogers v. District of Columbia*, App. D.C., 31 A.2d 649 (1943).

For the purposes of showing a continued course of immorality in a vagrancy prosecution, prior acts and admissions showing the defendant's acts to be part of a continuous operation are properly admitted. *Coley v. District of Columbia*, App. D.C., 177 A.2d 889 (1962).

Railroad station's employees permitted to testify. — In a vagrancy prosecution based on acts in a railroad station, the employees at the station are permitted to testify for the government. *Davenport v. District of Columbia*, App. D.C., 61 A.2d 486 (1948).

Good character evidence considered in determining witnesses' credibility. — In a prosecution for vagrancy, evidence of good character can be considered in determining the credibility of witnesses and such evidence, by itself, may be enough to create a reasonable doubt. *Killeen v. United States*, App. D.C., 224 A.2d 302 (1966).

Prosecution cannot impeach murder defendant's testimony by prior vagrancy convictions. — The prosecution is not entitled to attempt to impeach the testimony of a defendant indicted for second degree murder by referring to prior convictions of vagrancy. *Pinkney v. United States*, 363 F.2d 696 (D.C. Cir. 1966).

Offer of testimony waives motion for dismissal. — In a vagrancy prosecution, a motion for dismissal made at the conclusion of the government's case is waived when the defendant offers testimony in her own behalf. *Rogers v. District of Columbia*, App. D.C., 31 A.2d 649 (1943).

And motion for acquittal. — In a vagrancy prosecution, a motion for a finding of not guilty at the conclusion of the government's case is waived when the defendant offers testimony in her own behalf. *Wilson v. District of Columbia*, App. D.C., 65 A.2d 214 (1949).

Circumstantial evidence may sustain a vagrancy conviction. *Johnson v. District of Columbia*, App. D.C., 230 A.2d 483 (1967).

Evidence justifying conviction. — In a prosecution for vagrancy, in the absence of any proof of lawful employment or means of sup-

port, evidence which is adequate to prove the other elements of the offense justifies a conviction. *Clark v. District of Columbia*, App. D.C., 34 A.2d 711 (1943).

In a prosecution for vagrancy, the jury should find restaurant keepers guilty if it is convinced beyond a reasonable doubt that they knew or should have known of unlawful and immoral acts committed on their premises. *Killeen v. United States*, App. D.C., 224 A.2d 302 (1966).

Evidence insufficient to sustain conviction. — Evidence that the female defendant, while sober, well-behaved, and decently attired, was seen flagging down automobiles in the early morning hours is insufficient to sustain a conviction for vagrancy. *Johnson v. District of Columbia*, App. D.C., 230 A.2d 483 (1967).

Cited in *Hayes v. District of Columbia*, App. D.C., 34 A.2d 709 (1943); *Mitchell v. District of Columbia*, App. D.C., 113 A.2d 566 (1955); *Jones v. District of Columbia*, App. D.C., 158 A.2d 771 (1960); *Harris v. District of Columbia*, App. D.C., 167 A.2d 359 (1961); *Pinkney v. District of Columbia*, App. D.C., 168 A.2d 198 (1961); *Walker v. District of Columbia*, App. D.C., 196 A.2d 92 (1963); *Thompson v. District of Columbia*, App. D.C., 200 A.2d 92 (1964); *Smith v. United States*, 353 F.2d 877 (D.C. Cir. 1965); *Gomez v. Wilson*, 430 F.2d 495 (D.C. Cir. 1970); *Joseph v. United States*, App. D.C., 597 A.2d 14 (1991), cert. denied, 504 U.S. 928, 112 S. Ct. 1988, 118 L. Ed. 2d 585 (1992).

§ 22-3303. Prosecutions; burden of proof to show lawful employment.

In all prosecutions under paragraph (1) or (2) of § 22-3302 the burden of proof shall be upon the defendant to show that he or she has lawful employment or has lawful means of support realized from a lawful occupation or source. (Dec. 17, 1941, 55 Stat. 809, ch. 589, § 2; 1973 Ed., § 22-3303; May 21, 1994, D.C. Law 10-119, § 16(b), 41 DCR 1639.)

Section references. — This section is referred to in §§ 22-3203, and 22-3304 to 22-3306.

Effect of amendments. — D.C. Law 10-119 inserted "or she."

Legislative history of Law 10-119. — See note to § 22-3302.

Section is constitutional. *Rogers v. District of Columbia*, App. D.C., 31 A.2d 649 (1943).

Government's burden. — In a prosecution against defendants for vagrancy for frequenting and being employed in a house of ill fame, the government has the burden of proving that each defendant frequented the house and that each engaged in acts of fornication for hire. *Hunt v. District of Columbia*, App. D.C., 47 A.2d 783 (1946), aff'd, 163 F.2d 833 (D.C. Cir. 1947).

In vagrancy prosecutions, the burden is not on the government to disprove the legitimacy of the defendant's employment. *Rogers v. District of Columbia*, App. D.C., 31 A.2d 649 (1943); *Davenport v. District of Columbia*, App. D.C., 61 A.2d 486 (1948).

Defendant's burden arises upon proof of other elements of offense. — In a prosecution for vagrancy, the defendant has no burden to prove lawful employment or means of support until the government has first proved the other elements of the offense. *Clark v. District of Columbia*, App. D.C., 34 A.2d 711 (1943).

"Lawful employment" is a question of fact. *Williams v. District of Columbia*, App. D.C., 65 A.2d 924 (1949).

Defendant's uncontradicted and uncorroborated statement insufficient to discharge burden. — In a prosecution for vagrancy where the government establishes a prima facie case, the defendant's uncontradicted and uncorroborated statement that he had been doing work, in the absence of any testimony as to the details of the work or the compensation, or as to when the work ceased, is insufficient to discharge the defendant's burden. *Burns v. District of Columbia*, App. D.C., 34 A.2d 714 (1943).

Cited in *Barnard v. District of Columbia*, App. D.C., 125 A.2d 514 (1956).

§ 22-3304. Penalty; conditions imposed by court.

Any person convicted of vagrancy under the provisions of §§ 22-3302 to 22-3306 shall be punished by a fine of not more than \$300 or imprisonment for not more than 90 days, or by both such fine and imprisonment, in the discretion of the court. The court may impose conditions upon any person

found guilty under the aforesaid provisions and so long as such person shall comply therewith to the satisfaction of the court the imposition or execution of sentence may be suspended for such period as the court may direct; and the court may at or before the expiration of such period remand such sentence or cause it to be executed. Conditions thus imposed by the court may include submission to medical and mental examination, diagnosis, and treatment by proper public health and welfare authorities, and such other terms and conditions as the court may deem best for the protection of the community and the punishment, control, and rehabilitation of the defendant. The Department of Human Services of the District of Columbia, the Women's Bureau of the Police Department, and the probation officers of the court are authorized and directed to perform such duties as may be directed by the court in effectuating compliance with the conditions so imposed upon any defendant. (Dec. 17, 1941, 55 Stat. 809, ch. 589, § 3; Aug. 1, 1950, 64 Stat. 393, ch. 513, § 1; 1973 Ed., § 22-3304.)

Section references. — This section is referred to in §§ 22-3203, 22-3305 and 22-3306.

Office of Director of Public Health abolished. — Section 1 of the Act of August 1, 1950, 64 Stat. 393, ch. 513, provided that the Health Officer of the District of Columbia would be known as the Director of Public Health. The Health Department of the District of Columbia, including the office of the head thereof, was abolished and the functions thereof transferred to the Board of Commissioners of the District of Columbia by Reorganization Plan No. 5 of 1952. Reorganization Order No. 57 of the Board of Commissioners dated June 30, 1953, and Reorganization Order No. 52, dated June 30, 1953, combined and redesignated Organization Order No. 141, dated February 11, 1964, established under the direction and control of a Commissioner, a Department of Public Health headed by a Director, for the purpose of planning, implementing, and directing public health and hospital care programs, and for performing certain other allied medical and paramedical functions. The Anatomical Board was established under the direction and control of the Director of Public Health consisting of members as prescribed in the D. C. Code. The Order prior to redesignation abolished the previously existing Health Department, Gallinger Hospital, Glenn Dale Sanatorium, and the Anatomical Board, and transferred their functions

and positions to the new department. The organization of the new Department was set out in the Order. The executive functions of the Board of Commissioners were transferred to the Commissioner of the District of Columbia by § 401 of Reorganization Plan No. 3 of 1967. Functions stated in Organization Order No. 141 were transferred to the Director of the Department of Human Resources by Commissioner's Order No. 69-96, dated March 7, 1969, as amended by Commissioner's Order No. 70-83, dated March 6, 1970. The Department of Human Resources was replaced by Reorganization Plan No. 2 of 1979, dated February 21, 1980, which Plan established the Department of Human Services.

Prosecution cannot impeach murder defendant's testimony by prior vagrancy convictions. — The prosecution is not entitled to attempt to impeach the testimony of a defendant indicted for second degree murder by referring to prior convictions of vagrancy. *Pinkney v. United States*, 363 F.2d 696 (D.C. Cir. 1966).

District vagrancy conviction within Indigent Prisoners' Act. — A violation of the District vagrancy statute is a violation of the "law of United States" within the Indigent Prisoners' Act. *Clemmer v. Alexander*, 295 F.2d 176 (D.C. Cir. 1961).

§ 22-3305. Prosecutions.

All prosecutions under §§ 22-3302 to 22-3306 shall be in the Superior Court of the District of Columbia in the name of the District of Columbia, by the Corporation Counsel or any Assistant Corporation Counsel. (Dec. 17, 1941, 55 Stat. 810, ch. 589, § 4; Apr. 1, 1942, 56 Stat. 190, ch. 207, § 1; July 8, 1963, 77 Stat. 77, Pub. L. 88-60, § 1; July 29, 1970, 84 Stat. 570, Pub. L. 91-358, title I,

§ 155(a); 1973 Ed., § 22-3305; May 21, 1994, D.C. Law 10-119, § 16(c), 41 DCR 1639.)

Section references. — This section is referred to in §§ 22-3203, 22-3304 and 22-3306.

Effect of amendments. — D.C. Law 10-119 substituted “Assistant Corporation Counsel” for “of his assistants.”

Legislative history of Law 10-119. — See note to § 22-3302.

§ 22-3306. Right to strike or picket not abrogated.

Nothing in §§ 22-3302 to 22-3305 shall be construed so as to interfere with, or impede or diminish in any way, the right to strike or the right to picket. (Dec. 17, 1941, 55 Stat. 810, ch. 589, § 6; 1973 Ed., § 22-3306.)

Section references. — This section is referred to in §§ 22-3203, 22-3304 and 22-3305.

CHAPTER 33A. PANHANDLING CONTROL.

Sec.

22-3311. Definitions.

22-3312. Prohibited acts.

22-3313. Permitted activity.

Sec.

22-3314. Penalties.

22-3315. Conduct of prosecutions.

22-3316. Disclosure.

§ 22-3311. Definitions.

For the purposes of this chapter, the term:

(1) "Aggressive manner" means:

(A) Approaching, speaking to, or following a person in a manner as would cause a reasonable person to fear bodily harm or the commission of a criminal act upon the person, or upon property in the person's immediate possession;

(B) Touching another person without that person's consent in the course of asking for alms;

(C) Continuously asking, begging, or soliciting alms from a person after the person has made a negative response; or

(D) Intentionally blocking or interfering with the safe or free passage of a person by any means, including unreasonably causing a person to take evasive action to avoid physical contact.

(2) "Ask, beg, or solicit alms" includes the spoken, written, or printed word or such other act conducted for the purpose of obtaining an immediate donation of money or thing of value. (Nov. 17, 1993, D.C. Law 10-54, § 2, 40 DCR 5450.)

Legislative history of Law 10-54. — Law 10-54, the "Panhandling Control Act of 1993," was introduced in Council and assigned Bill No. 10-72, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on June 1, 1993, and June

29, 1993, respectively. Signed by the Mayor on July 16, 1993, it was assigned Act No. 10-48 and transmitted to both Houses of Congress for its review. D.C. Law 10-54 became effective on November 17, 1993.

§ 22-3312. Prohibited acts.

(a) No person may ask, beg, or solicit alms, including money and other things of value, in an aggressive manner in any place open to the general public, including sidewalks, streets, alleys, driveways, parking lots, parks, plazas, buildings, doorways and entrances to buildings, and gasoline service stations, and the grounds enclosing buildings.

(b) No person may ask, beg, or solicit alms in any public transportation vehicle; or at any bus, train, or subway station or stop.

(c) No person may ask, beg, or solicit alms within 10 feet of any automatic teller machine (ATM).

(d) No person may ask, beg, or solicit alms from any operator or occupant of a motor vehicle that is in traffic on a public street.

(e) No person may ask, beg, or solicit alms from any operator or occupant of a motor vehicle on a public street in exchange for blocking, occupying, or reserving a public parking space, or directing the operator or occupant to a public parking space.

(f) No person may ask, beg, or solicit alms in exchange for cleaning motor vehicle windows while the vehicle is in traffic on a public street.

(g) No person may ask, beg, or solicit alms in exchange for protecting, watching, washing, cleaning, repairing, or painting a motor vehicle or bicycle while it is parked on a public street.

(h) No person may ask, beg, or solicit alms on private property or residential property, without permission from the owner or occupant. (Nov. 17, 1993, D.C. Law 10-54, § 3, 40 DCR 5450.)

Section references. — This section is referred to in § 22-3314.

Legislative history of Law 10-54. — See note to § 22-3311.

§ 22-3313. Permitted activity.

Acts authorized as an exercise of a person's constitutional right to picket, protest, or speak, and acts authorized by a permit issued by the District of Columbia government shall not constitute unlawful activity under this chapter. (Nov. 17, 1993, D.C. Law 10-54, § 4, 40 DCR 5450.)

Legislative history of Law 10-54. — See note to § 22-3311.

§ 22-3314. Penalties.

(a) Any person convicted of violating any provision of § 22-3312 shall be fined not more than \$300 or be imprisoned not more than 90 days or both.

(b) In lieu of or in addition to the penalty provided in subsection (a) of this section, a person convicted of violating any provision of § 22-3312 may be required to perform community service as provided in § 16-712. (Nov. 17, 1993, D.C. Law 10-54, § 5, 40 DCR 5450.)

Legislative history of Law 10-54. — See note to § 22-3311.

§ 22-3315. Conduct of prosecutions.

Prosecutions for violations of this chapter shall be conducted in the name of the District of Columbia by the Corporation Counsel. (Nov. 17, 1993, D.C. Law 10-54, § 6, 40 DCR 5450.)

Legislative history of Law 10-54. — See note to § 22-3311.

§ 22-3316. Disclosure.

Any arrest or conviction under this chapter shall be disclosed to public and private social service agencies that request the Metropolitan Police Department or the court to be notified of such events. (Nov. 17, 1993, D.C. Law 10-54, § 7, 40 DCR 5450.)

Legislative history of Law 10-54. — See note to § 22-3311.

CHAPTER 34. MISCELLANEOUS PROVISIONS.

Sec.	Sec.
22-3401. [Omitted].	22-3422. Sections 22-3416 to 22-3422 supplemental to Federal Food, Drug, and Cosmetic Act.
22-3402, 22-3403. [Repealed].	
22-3404 to 22-3406. [Repealed].	22-3423. Use of "District of Columbia" or similar designation by private detective or collection agency — Prohibited.
22-3407, 22-3408. [Repealed].	
22-3409 to 22-3413. [Repealed].	22-3424. Same — Penalty.
22-3414. [Repealed].	22-3425. Same — Prosecutions for violations.
22-3415. [Repealed].	22-3426. Debt adjusting; prohibitions; exceptions; penalties; prosecutions for violations.
22-3416. Sale of unwholesome food — Prohibited.	22-3427. Breaking and entering vending machines and similar devices.
22-3417. Same — "Food" defined.	
22-3418. Same — Inspection authorized.	
22-3419. Same — Council to make rules and regulations.	
22-3420. Same — Prosecutions for violations.	
22-3421. Same — Penalty.	

§ 22-3401. "Gift enterprise" defined.

Omitted.

§§ 22-3402, 22-3403. Gift enterprise — Prohibited; penalty.

Repealed. Sept. 21, 1961, 75 Stat. 565, Pub. L. 87-267, § 1.

§§ 22-3404 to 22-3406. Kosher meat — Sale; labeling; signs displayed where kosher and nonkosher meats sold; definitions; penalties.

Repealed. Dec. 1, 1982, D.C. Law 4-164, § 602(ss)-(uu), 29 DCR 3976.

Legislative history of Law 4-164. — Law 4-164, the "District of Columbia Theft and White Collar Crimes Act of 1982," was introduced in Council and assigned Bill No. 4-133 which was referred to the Committee on the Judiciary. The Bill was adopted on first, amended first and second readings on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.

§§ 22-3407, 22-3408. Limitation of hours of daily service for laborers and mechanics on public works; penalty for violation of § 22-3407.

Repealed. Aug. 13, 1962, 76 Stat. 360, Pub. L. 87-581, § 203.

§§ 22-3409 to 22-3413. Mislabeling potatoes (Prohibited; sign to show grade; exception for seed potatoes; penalties); procuring enlistment of criminals.

Repealed. Dec. 1, 1982, D.C. Law 4-164, § 602(vv)-(zz), 29 DCR 3976.

Legislative history of Law 4-164. — See note to § 22-3404.

§ 22-3414. Use of the flag for advertising purposes; mutilation of the flag.

Repealed. July 30, 1947, 61 Stat. 646, ch. 389, § 2.

Cross references. — As to reenactment of this provision in the United States Code, see 4 U.S.C. § 3.

§ 22-3415. Discrimination by theatre proprietors against persons wearing uniform of armed services prohibited.

Repealed. June 25, 1948, 62 Stat. 864, ch. 645, § 21.

Cross references. — As to reenactment of this provision in the United States Code, see 18 U.S.C. § 244.

§ 22-3416. Sale of unwholesome food — Prohibited.

No person shall sell, or cause to be sold, or offer for sale any food which is unwholesome or unfit for use. (Dec. 16, 1941, 55 Stat. 807, ch. 587, § 1; 1973 Ed., § 22-3416.)

Section references. — This section is referred to in §§ 22-3417 and 22-3419 to 22-3422.

Section does not cover manufacturing, nor adulterated food. — This section does not cover the manufacture, as well as the sale,

of food, and it does not cover food which is adulterated without being unwholesome or unfit for use. *Rubenstein v. United States*, 153 F.2d 127 (D.C. Cir. 1946).

§ 22-3417. Same — “Food” defined.

For the purposes of §§ 22-3416 to 22-3422 the term “food” means any article used for consumption by a human being or an animal. (Dec. 16, 1941, 55 Stat. 807, ch. 587, § 2; 1973 Ed., § 22-3417.)

Section references. — This section is referred to in §§ 22-3419 to 22-3422.

§ 22-3418. Same — Inspection authorized.

It shall be the duty of the Director of the Department of Human Services of the District of Columbia, and the Director or the Director’s duly appointed agent is hereby authorized, to inspect all food possessed or offered for sale, donation, or distribution and condemn, denature, destroy, seize, or remove such food as may be unfit for consumption. (Dec. 16, 1941, 55 Stat. 807, ch. 587, § 3; Aug. 1, 1950, 64 Stat. 393, ch. 513, § 1; 1973 Ed., § 22-3418; Oct. 18, 1981, D.C. Law 4-39, § 4, 28 DCR 3391; May 21, 1994, D.C. Law 10-119, § 17(a), 41 DCR 1639.)

Section references. — This section is referred to in §§ 22-3417 and 22-3419 to 22-3422.

Effect of amendments. — D.C. Law 10-119 substituted “the Director or the Director’s duly appointed agent” for “he or his duly appointed agent.”

Legislative history of Law 4-39. — Law 4-39, the “Good Faith Donor and Donee Act of 1981,” was introduced in Council and assigned Bill No. 4-4, which was referred to the Committee on Human Services. The Bill was adopted on first and second readings on June 16, 1981, and June 30, 1981, respectively. Signed by the Mayor on July 20, 1981, it was assigned Act No.

4-66 and transmitted to both Houses of Congress for its review.

Legislative history of Law 10-119. — Law 10-119, the “Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

§ 22-3419. Same — Council to make rules and regulations.

The Council of the District of Columbia is authorized to make such rules and regulations as may be necessary to carry out the provisions of §§ 22-3416 to 22-3422. (Dec. 16, 1941, 55 Stat. 808, ch. 587, § 4; 1973 Ed., § 22-3419.)

Section references. — This section is referred to in §§ 22-3417 and 22-3420 to 22-3422.

Change in government. — This section originated at a time when local government powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 402(208) of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of the functions of the Board of Commissioners under this section to the District of Columbia Council, subject to the right of the Commis-

sioner as provided in § 406 of the Plan. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-211), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-213(a)), appropriate changes in terminology were made in this section.

§ 22-3420. Same — Prosecutions for violations.

Prosecutions for violations of any of the provisions of §§ 22-3416 to 22-3422 or of any regulations promulgated thereunder shall be on information in the Superior Court of the District of Columbia by the Corporation Counsel of the District of Columbia or any Assistant Corporation Counsel. (Dec. 16, 1941, 55 Stat. 808, ch. 587, § 5; Apr. 1, 1942, 56 Stat. 190, ch. 207, § 1; July 8, 1963, 77 Stat. 77, Pub. L. 88-60, § 1; July 29, 1970, 84 Stat. 570, Pub. L. 91-358, title I, § 155(a); 1973 Ed., § 22-3420; May 21, 1994, D.C. Law 10-119, § 17(b), 41 DCR 1639.)

Section references. — This section is referred to in §§ 22-3417, 22-3419, 22-3421 and 22-3422.

Effect of amendments. — D.C. Law 10-119

substituted “Assistant Corporation Counsel” for “of his assistants.”

Legislative history of Law 10-119. — See note to § 22-3418.

§ 22-3421. Same — Penalty.

Any person violating any of the provisions of §§ 22-3416 to 22-3422 or any of the regulations promulgated thereunder shall, upon conviction, be fined not

more than \$300 or imprisoned for not more than 90 days. (Dec. 16, 1941, 55 Stat. 808, ch. 587, § 6; 1973 Ed., § 22-3421.)

Section references. — This section is referred to in §§ 22-3417, 22-3419, 22-3420 and 22-3422.

§ 22-3422. Sections 22-3416 to 22-3422 supplemental to Federal Food, Drug, and Cosmetic Act.

Sections 22-3416 to 22-3422 shall in no respect be considered as a repeal of any of the provisions of the Federal Food, Drug, and Cosmetic Act, but shall be construed as supplemental thereto. (Dec. 16, 1941, 55 Stat. 808, ch. 587, § 7; 1973 Ed., § 22-3422.)

Section references. — This section is referred to in §§ 22-3417 and 22-3419 to 22-3421.

section, is the Act of June 25, 1938, 52 Stat. 1040, ch. 675.

References in text. — The Federal Food, Drug, and Cosmetic Act, referred to in this

§ 22-3423. Use of “District of Columbia” or similar designation by private detective or collection agency — Prohibited.

No person engaged in the business of collecting or aiding in the collection of private debts or obligations, or engaged in furnishing private police, investigation, or other private detective services, shall use as part of the name of such business, or employ in any communication, correspondence, notice, advertisement, circular, or other writing or publication, the words “District of Columbia”, “District”, the initials “D.C.”, or any emblem or insignia utilizing any of the said terms as part of its design, in such manner as reasonably to convey the impression or belief that such business is a department, agency, bureau, or instrumentality of the municipal government of the District of Columbia or in any manner represents the District of Columbia. As used in this section and § 22-3424, the word “person” means and includes individuals, associations, partnerships, and corporations. (Oct. 16, 1962, 76 Stat. 1071, Pub. L. 87-837, § 1; 1973 Ed., § 22-3423.)

Section references. — This section is referred to in §§ 22-3424 and 22-3425.

§ 22-3424. Same — Penalty.

Any person who violates § 22-3423 shall be punished by a fine of not more than \$300 or by imprisonment for not more than 90 days, or by both such fine and imprisonment. (Oct. 16, 1962, 76 Stat. 1071, Pub. L. 87-837, § 2; 1973 Ed., § 22-3424.)

Section references. — This section is referred to in § 22-3423.

§ 22-3425. Same — Prosecutions for violations.

All prosecutions for violations of § 22-3423 shall be conducted in the name of the District of Columbia by the Corporation Counsel or any Assistant Corporation Counsel. As used in this section the term “Corporation Counsel” means the Attorney for the District of Columbia, by whatever title such attorney may be known, designated by the Mayor of the District of Columbia to perform the functions prescribed for the Corporation Counsel in this section. (Oct. 16, 1962, 76 Stat. 1071, Pub. L. 87-837, § 3; 1973 Ed., § 22-3425; May 21, 1994, D.C. Law 10-119, § 18, 41 DCR 1639.)

Effect of amendments. — D.C. Law 10-119 substituted “Assistant Corporation Counsel” for “of his assistants” in the first sentence.

Legislative history of Law 10-119. — See note to § 22-3418.

Change in government. — This section originated at a time when local government powers were delegated to a Board of Commissioners of the District of Columbia (see Acts Relating to the Establishment of the District of Columbia and its Various Forms of Governmental Organization in Volume 1). Section 401 of Reorganization Plan No. 3 of 1967 (see Reorganization Plans in Volume 1) transferred all of

the functions of the Board of Commissioners under this section to a single Commissioner. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-211), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-213(a)), appropriate changes in terminology were made in this section.

§ 22-3426. Debt adjusting; prohibitions; exceptions; penalties; prosecutions for violations.

(a) As used in this section:

(1) “Debt adjusting” means an activity, whether referred to by the term “budget counseling”, “budget planning”, “budget service”, “credit advising”, “debt adjusting”, “debt counseling”, “debt help”, “financial adjusting”, “financial arranging”, “prorating”, or some other term of like import, which involves a particular debtor’s entering into an express or implied contract whereby the debtor agrees to pay an amount or amounts of money periodically or otherwise to a person who agrees, for a consideration, to distribute such money among specified creditors in accordance with a plan agreed upon between the debtor and the person to whom the debtor makes or agrees to make such payments.

(2) “Person” does not include an individual admitted to the bar of the United States District Court for the District of Columbia.

(3) “Partnership” does not include a partnership all the members of which are admitted to the bar of the United States District Court for the District of Columbia.

(b) Except as provided in subsection (c) of this section, no person, partnership, association, or corporation shall engage in the business of debt adjusting in the District of Columbia.

(c) The provisions of this section shall not apply to those situations involving debt adjusting incurred incidentally in the lawful practice of law in the District of Columbia nor shall anything in this section be construed to apply to any nonprofit or charitable corporation or association which engages in debt adjusting even though the nonprofit corporation or association may charge and

collect nominal sums as reimbursement for expenses in connection with such services.

(d)(1) Whoever violates subsection (b) of this section shall be subject to a fine of not more than \$1,000 and to imprisonment for not more than 6 months, or to both.

(2) Prosecutions for violations of this section shall be conducted in the name of the District of Columbia by the Corporation Counsel or any Assistant Corporation Counsel. (May 22, 1970, 84 Stat. 264, Pub. L. 91-266; 1973 Ed., § 22-3426; May 21, 1994, D.C. Law 10-119, § 19, 41 DCR 1639.)

Effect of amendments. — D.C. Law 10-119 substituted "Assistant Corporation Counsel" for "of his assistants" in (d)(2).

Legislative history of Law 10-119. — See note to § 22-3418.

§ 22-3427. Breaking and entering vending machines and similar devices.

Whoever in the District of Columbia breaks open, opens, or enters, without right, any parking meter, coin telephone, vending machine dispensing goods or services, money changer, or any other device designed to receive currency, with intent to carry away any part of such device or anything contained therein, shall be sentenced to a term of imprisonment of not more than 3 years or to a fine of not more than \$3,000, or both. (July 29, 1970, 84 Stat. 600, Pub. L. 91-358, title II, § 203; 1973 Ed., § 22-3427.)

Indictment insufficient for failure to aver property belonged to someone else. — An indictment charging that the defendant "broke open, opened, and entered without right a juke box, with intent to carry away a part of such device, and something contained therein" is insufficient for failure to aver that the property belonged to someone other than the defendant. *United States v. Pendergrast*, App. D.C., 313 A.2d 103 (1973).

Burden of proof. — The government must prove beyond a reasonable doubt that the accused lacked authority from the rightful owner of the property. *Craig v. United States*, App. D.C., 490 A.2d 1173 (1985).

Attempted breaking and entering. — Chapter 19 referred to in § 22-103 — the "general attempts" statute — was actually Chapter 19 of the 1901 District of Columbia Code, which chapter is only a portion of the present Title 22 (and is a portion that does not

and did not include this section or any of its predecessors). Thus, § 22-103 does not apply to this section and, no other basis for a crime of "attempted breaking and entering — vending machine" having been cited, such a crime does not exist in the District of Columbia. *United States v. Hughes*, 115 WLR 1077 (Super. Ct. 1987).

Failure to present evidence that accused lacked authority to open parking meter. — Where an eyewitness and the arresting officer both testified, identifying the defendant as 1 of 2 men who tried to break into a parking meter but the government presented no evidence that the defendant lacked authority to open the meter, the evidence was insufficient to support a conviction. *Bolan v. United States*, App. D.C., 587 A.2d 458 (1991).

Cited in *Cornwell v. United States*, App. D.C., 451 A.2d 628 (1982); *Brooks v. United States*, App. D.C., 599 A.2d 1094 (1991).

CHAPTER 35. SEXUAL PSYCHOPATHS.

Sec.

22-3501, 22-3502. [Repealed].

22-3503. Definitions.

22-3504. Filing of statement.

22-3505. Right to counsel.

22-3506. Examination by psychiatrists.

Sec.

22-3507. When hearing is required.

22-3508. Hearing; commitment.

22-3509. Parole; discharge.

22-3510. Stay of criminal proceedings.

22-3511. Criminal law unchanged.

§§ 22-3501, 22-3502. Indecent acts with children; sodomy.

Repealed. May 23, 1995, D.C. Law 10-257, § 501(b), 42 DCR 53.

Cross references. — As to prohibition of sexual performances using minors, see subchapter II of Chapter 20 of this title.

As to exception of child witness' testimony from corroboration requirement, see § 23-114.

Section references. — This section is referred to in § 24-482.

Legislative history of Law 10-257. — Law 10-257, the "Anti-Sexual Abuse Act of 1994,"

was introduced in Council and assigned Bill No. 10-87, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on November 1, 1994, and December 6, 1994, respectively. Signed by the Mayor on December 28, 1994, it was assigned Act No. 10-385 and transmitted to both Houses of Congress for its review. D.C. Law 10-257 became effective May 23, 1995.

§ 22-3503. Definitions.

For the purposes of §§ 22-3503 to 22-3511:

(1) The term "sexual psychopath" means a person, not insane, who by a course of repeated misconduct in sexual matters has evidenced such lack of power to control his or her sexual impulses as to be dangerous to other persons because he or she is likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of his or her desire.

(2) The term "court" means a court in the District of Columbia having jurisdiction of criminal offenses or delinquent acts.

(3) The term "patient" means a person with respect to whom there has been filed with the clerk of any court a statement in writing setting forth facts tending to show that such person is a sexual psychopath.

(4) The term "criminal proceeding" means a proceeding in any court against a person for a criminal offense, and includes all stages of such a proceeding from the time the person is indicted, charged by an information, or charged with a delinquent act, to the entry of judgment, or, if the person is granted probation, the completion of the period of probation. (June 9, 1948, 62 Stat. 347, ch. 428, title II, § 201; June 25, 1948, 62 Stat. 991, ch. 646, § 32(b); May 24, 1949, 63 Stat. 107, ch. 139, § 127; July 8, 1963, 77 Stat. 77, Pub. L. 88-60, § 1; July 29, 1970, 84 Stat. 574, Pub. L. 91-358, title I, § 157(c) (1) (A), (B); 1973 Ed., § 22-3503; May 21, 1994, D.C. Law 10-119, § 20(a), 41 DCR 1639.)

Section references. — This section is referred to in §§ 22-3505 to 22-3507 and 22-3509 to 22-3511.

Effect of amendments. — D.C. Law 10-119, in (1), inserted "or her" twice and inserted "or she."

Legislative history of Law 10-119. — Law 10-119, the "Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was

adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Section is not unconstitutional. *Malone v. Overholzer*, 93 F. Supp. 647 (D.D.C. 1950).

But constitutional guaranties come into play. — In a proceeding under the sexual psychopath provisions, the constitutional guaranties implicit in due process of law must come into play. *Millard v. Harris*, 406 F.2d 964 (D.C. Cir. 1968).

"Not insane" defined. — The words "not insane," as used in the sexual psychopath provisions, mean "not mentally ill." *Millard v. Harris*, 406 F.2d 964 (D.C. Cir. 1968); *Cross v. Harris*, 418 F.2d 1095 (D.C. Cir. 1969).

Mentally ill person cannot be a sexual psychopath. *Norwood v. Jacobs*, 430 F.2d 903 (D.C. Cir. 1970).

Sexual psychopath provisions do not require establishment of course of habitual sexual misconduct. *Lomax v. District of Columbia*, App. D.C., 211 A.2d 772 (1965).

"Sexual" given common meaning. — In determining what acts may be considered in applying the sexual psychopath provisions, the court must read "sexual" in the common reading of that term. *Millard v. Harris*, 406 F.2d 964 (D.C. Cir. 1968).

Likely dangerous conduct must be serious or substantial. — This section requires that the likely dangerous conduct be not merely repulsive or repugnant but must have a serious effect on the viewer. *Millard v. Cameron*, 373 F.2d 468 (D.C. Cir. 1966).

In enacting §§ 22-3503 to 22-3511, Congress did not intend to authorize an indefinite preventive detention for those who have a propensity to behave in a way that is merely offensive or obnoxious to others; the threatened harm must be substantial. *Cross v. Harris*, 418 F.2d 1095 (D.C. Cir. 1969).

Commitment under these sections cannot be based simply on mere possibility of injury. *Cross v. Harris*, 418 F.2d 1095 (D.C. Cir. 1969).

"Injury" and "pain" defined. — "Injury," within the meaning of this section, includes injury to feelings and "pain" includes mental suffering. *Carras v. District of Columbia*, App. D.C., 183 A.2d 393 (1962).

Sections providing for the commitment of sexual psychopaths are not criminal statutes. *Malone v. Overholzer*, 93 F. Supp. 647 (D.D.C. 1950).

Conditions justifying commitment. — Predictions of dangerousness which will justify a commitment as a sexual psychopath require a determination of: (1) The type of conduct of which the individual may engage; (2) the like-

lihood or probability that he will indulge in that conduct; and (3) the effect that such conduct if engaged in will have on others. *Millard v. Harris*, 406 F.2d 964 (D.C. Cir. 1968).

In determining the likelihood of harm to ascertain whether a person should be committed under §§ 22-3501 to 22-3511, particularly relevant considerations are: Seriousness of expected harm; availability of in-patient and out-patient treatment; and expected length of confinement required for in-patient treatment. *Cross v. Harris*, 418 F.2d 1095 (D.C. Cir. 1969).

Indefinite commitment justifiable only for therapeutic treatment. — An indefinite commitment pursuant to the sexual psychopath provisions is justifiable only upon a theory of therapeutic treatment. *Clatterbuck v. Harris*, 295 F. Supp. 84 (D.D.C. 1968).

Section was not repealed by the Hospitalization of Mentally Ill Act (§ 21-501 et seq.). *Millard v. Harris*, 406 F.2d 964 (D.C. Cir. 1968).

These provisions do not contain procedural protections of Hospitalization of Mentally Ill Act. *Millard v. Harris*, 406 F.2d 964 (D.C. Cir. 1968).

Protection of Hospitalization of Mentally Ill Act is limited to those declared insane or of unsound mind pursuant to a court order and does not include any person previously committed under the sexual psychopath provisions. *Millard v. Harris*, 406 F.2d 964 (D.C. Cir. 1968).

Habeas corpus petitioner must show that confinement unjustified. — A habeas corpus petitioner has the burden to show by a preponderance of the evidence that his continued confinement as a sexual psychopath is not justified. *Millard v. Harris*, 406 F.2d 964 (D.C. Cir. 1968).

And commitment issue valid despite release. — Inasmuch as a habeas corpus petitioner will continue to suffer adverse consequences as result of a commitment under §§ 22-3503 to 22-3511, the issue of the validity of the commitment is not moot even though the petitioner has been released. *Justin v. Jacobs*, 449 F.2d 1017 (D.C. Cir. 1971).

But not cognizable where failure to appeal. — A claim that there was insufficient evidence to justify a commitment as a sexual psychopath is not cognizable in a habeas corpus proceeding in view of the failure to appeal from the commitment hearing. *Justin v. Jacobs*, 449 F.2d 1017 (D.C. Cir. 1971).

Habeas proceeding must consider reason for commitment and likelihood of misconduct. — The court in a habeas corpus proceeding must distinguish between the petitioner's sexual and nonsexual misconduct as a reason for his commitment and evaluate the likelihood, as opposed to the mere possibility, that the petitioner will engage in sexual mis-

conduct if released. *Millard v. Harris*, 406 F.2d 964 (D.C. Cir. 1968).

And petitioner not entitled to release where still dangerous psychopath. — A habeas corpus petitioner who is under hospital commitment as a sexual psychopath is not entitled to be released on the ground that he is

not mentally ill where psychiatric testimony establishes that he is still a sexual psychopath who is likely to be of danger to others if permitted to return to society. *Clatterbuck v. Harris*, 295 F. Supp. 84 (D.D.C. 1968).

Cited in *Jenkins v. United States*, App. D.C., 548 A.2d 102 (1988).

§ 22-3504. Filing of statement.

(a) Whenever it shall appear to the United States Attorney for the District of Columbia that any person within the District of Columbia, other than a defendant in a criminal proceeding, is a sexual psychopath, such Attorney may file with the clerk of the Superior Court of the District of Columbia a statement in writing setting forth the facts tending to show that such a person is a sexual psychopath.

(b) Whenever it shall appear to the United States Attorney for the District of Columbia that any defendant in any criminal proceeding prosecuted by such Attorney or any Assistant United States Attorney is a sexual psychopath, such Attorney may file with the clerk of the court in which such proceeding is pending a statement in writing setting forth the facts tending to show that such defendant is a sexual psychopath.

(c) Whenever it shall appear to any court that any defendant in any criminal proceeding pending in such court is a sexual psychopath, the court may, if it deems such procedure advisable, direct the officer prosecuting the defendant to file with the clerk of such court a statement in writing setting forth the facts tending to show that such defendant is a sexual psychopath.

(d) Any statement filed in a criminal proceeding pursuant to subsection (b) or (c) of this section may be filed only:

- (1) Before trial;
- (2) After conviction or plea of guilty but before sentencing; or
- (3) After conviction or plea of guilty but before the completion of probation.

(e) This section shall not apply to an individual in a criminal proceeding who is charged with first degree sexual abuse, second degree sexual abuse, or assault with intent to commit first or second degree sexual abuse. (June 9, 1948, 62 Stat. 348, ch. 428, title II, § 202; June 25, 1948, 62 Stat. 991, ch. 646, § 32(b); May 24, 1949, 63 Stat. 107, ch. 139, § 127; July 29, 1970, 84 Stat. 574, Pub. L. 91-358, title I, § 157(c) (2); 1973 Ed., § 22-3504; May 21, 1994, D.C. Law 10-119, § 20(b), 41 DCR 1639; May 23, 1995, D.C. Law 10-257, § 401(d), 42 DCR 53.)

Section references. — This section is referred to in §§ 22-3503, 22-3505 to 22-3507 and 22-3509 to 22-3511.

Effect of amendments. — D.C. Law 10-119 substituted "Assistant United States Attorney" for "of his assistants" in (b).

D.C. Law 10-257 substituted "first degree sexual abuse, second degree sexual abuse, or assault with intent to commit first or second

degree sexual abuse" for "rape or assault with intent to rape" in (e).

Legislative history of Law 10-119. — See note to § 22-3503.

Legislative history of Law 10-257. — See note to § 22-3501.

Test of what anticipated conduct may justify preventive detention is simply whether the legislature has the power to pro-

hibit such conduct or to attack the evil it portends. *Cross v. Harris*, 418 F.2d 1095 (D.C. Cir. 1969).

Where competency raised, judge errs in proceeding to criminal sentencing. — Where a doubt of competency for criminal sentencing for sexually violating a child is raised, the judge errs in proceeding to sentence. *Fuller v. United States*, 390 F.2d 468 (D.C. Cir. 1967).

Competency hearing should embrace the mental condition of the defendant at the time of the alleged offense, what kind of judgment or sentence is appropriate, and what kind of disposition should be made, including a possible civil commitment. *Fuller v. United States*, 390 F.2d 468 (D.C. Cir. 1967).

§ 22-3505. Right to counsel.

A patient shall have the right to have the assistance of counsel at every stage of the proceeding under §§ 22-3503 to 22-3511. Before the court appoints psychiatrists pursuant to § 22-3506 it shall advise the patient of his or her right to counsel and shall assign counsel to represent him or her unless the patient is able to obtain counsel or elects to proceed without counsel. (June 9, 1948, 62 Stat. 348, ch. 428, title II, § 203; 1973 Ed., § 22-3505; May 21, 1994, D.C. Law 10-119, § 20(c), 41 DCR 1639.)

Section references. — This section is referred to in §§ 22-3503, 22-3506, 22-3507 and 22-3509 to 22-3511.

Effect of amendments. — D.C. Law 10-119 inserted "or her" twice in the last sentence.

Legislative history of Law 10-119. — See note to § 22-3503.

§ 22-3506. Examination by psychiatrists.

(a) When a statement has been filed with the clerk of any court pursuant to § 22-3504, such court shall appoint 2 qualified psychiatrists to make a personal examination of the patient. The patient shall be required to answer questions asked by the psychiatrists under penalty of contempt of court. Each psychiatrist shall file a written report of the examination, which shall include a statement of his or her conclusion as to whether the patient is a sexual psychopath.

(b) The counsel for the patient shall have the right to inspect the reports of the examination of the patient. No such report and no evidence resulting from the personal examination of the patient shall be admissible against him or her in any judicial proceeding except a proceeding under §§ 22-3503 to 22-3511 to determine whether the patient is a sexual psychopath. (June 9, 1948, 62 Stat. 348, ch. 428, title II, § 204; 1973 Ed., § 22-3506; May 21, 1994, D.C. Law 10-119, § 20(d), 41 DCR 1639.)

Section references. — This section is referred to in §§ 22-3503, 22-3505 and 22-3507 to 22-3511.

Effect of amendments. — D.C. Law 10-119 inserted "or her" in the last sentences in (a) and (b).

Legislative history of Law 10-119. — See note to § 22-3503.

Sodomy alone insufficient to require mental examination. — The nature of the crime of sodomy is not sufficient alone to require the court, before accepting a guilty plea,

to order a mental examination of the accused. *Carter v. United States*, 283 F.2d 200 (D.C. Cir. 1960).

Conclusory statement in the psychiatrists' report is insufficient for a commitment as a sexual psychopath, in the absence of a full hearing. *Millard v. Cameron*, 373 F.2d 468 (D.C. Cir. 1966).

Sexual psychopath provisions require hearing in which psychiatrist can be examined and cross-examined. *Millard v. Cameron*, 373 F.2d 468 (D.C. Cir. 1966).

Questions on which expert testimony relevant in commitment proceeding. —

The likelihood of a recurrence of sexual misconduct, the likely frequency of such behavior, and the magnitude of harm to other persons that is likely to result are questions of fact on which expert testimony would be relevant in a proceeding to commit a person under §§ 22-3501 to 22-3511. *Cross v. Harris*, 418 F.2d 1095 (D.C. Cir. 1969).

One involuntarily committed entitled to relief for unsuitable and inadequate treatment. —

One involuntarily committed to a public hospital as a sexual psychopath is entitled to relief upon a showing that he is not receiving reasonably suitable and adequate treatment. *Millard v. Cameron*, 373 F.2d 468 (D.C. Cir. 1966).

§ 22-3507. When hearing is required.

If, in their reports filed pursuant to § 22-3506, both psychiatrists state that the patient is a sexual psychopath, or if both state that they are unable to reach any conclusion by reason of the partial or complete refusal of the patient to submit to thorough examination, or if one states that the patient is a sexual psychopath and the other states that he or she is unable to reach any conclusion by reason of the partial or complete refusal of the patient to submit to thorough examination, then the court shall conduct a hearing in the manner provided in § 22-3508 to determine whether the patient is a sexual psychopath. If, on the basis of the reports filed, the court is not required to conduct such a hearing, the court shall enter an order dismissing the proceeding under §§ 22-3503 to 22-3511 to determine whether the patient is a sexual psychopath. (June 9, 1948, 62 Stat. 349, ch. 428, title II, § 205; 1973 Ed., § 22-3507; May 21, 1994, D.C. Law 10-119, § 20(e), 41 DCR 1639.)

Section references. — This section is referred to in §§ 22-3503, 22-3505, 22-3506 and 22-3509 to 22-3511.

Effect of amendments. — D.C. Law 10-119 inserted "or she" in the first sentence.

Legislative history of Law 10-119. — See note to § 22-3503.

§ 22-3508. Hearing; commitment.

Upon the evidence introduced at a hearing held for that purpose, the court shall determine whether or not the patient is a sexual psychopath. Such hearing shall be conducted without a jury unless, before such hearing and within 15 days after the date on which the second report is filed pursuant to § 22-3506, a jury is demanded by the patient or by the officer filing the statement. The rules of evidence applicable in judicial proceedings in the court shall be applicable to hearings pursuant to this section; but, notwithstanding any such rule, evidence of conviction of any number of crimes the commission of which tends to show that the patient is a sexual psychopath and of the punishment inflicted therefor shall be admissible at any such hearing. The patient shall be entitled to an appeal as in other cases. If the patient is determined to be a sexual psychopath, the court shall commit him or her to an institution to be confined there until released in accordance with § 22-3509. (June 9, 1948, 62 Stat. 349, ch. 428, title II, § 206; 1973 Ed., § 22-3508; Nov. 8, 1984, 98 Stat. 3369, Pub. L. 98-621, § 10(t)(1); May 21, 1994, D.C. Law 10-119, § 20(f), 41 DCR 1639.)

Section references. — This section is referred to in §§ 22-3503, 22-3505 to 22-3507 and 22-3509 to 22-3511.

Effect of amendments. — D.C. Law 10-119 inserted “or her” in the last sentence.

Legislative history of Law 10-119. — See note to § 22-3503.

Section is not unconstitutional. *Malone v. Overholzer*, 93 F. Supp. 647 (D.D.C. 1950).

Section is not a criminal statute. *Malone v. Overholzer*, 93 F. Supp. 647 (D.D.C. 1950).

Conclusory statement in the psychiatrists’ report is insufficient for a commitment as a sexual psychopath, in the absence of a full hearing. *Millard v. Cameron*, 373 F.2d 468 (D.C. Cir. 1966).

Alleged psychopath is entitled to a hearing before the court, at which he is entitled to representation by counsel. *Malone v. Overholzer*, 93 F. Supp. 647 (D.D.C. 1950).

The sexual psychopath provisions require a psychiatric hearing in which the psychiatrist can be examined and cross examined. *Millard v. Cameron*, 373 F.2d 468 (D.C. Cir. 1966).

Defendant arrested for indecent exposure may be a sexual psychopath. *Carras v. District of Columbia*, App. D.C., 183 A.2d 393 (1962).

Defendant suffering from mental disorder not eligible for commitment. — Where the defendant is suffering from a mental disorder

and the alleged offenses, if committed by him, were the products of his illness, he is not at that time eligible for commitment as a sexual psychopath. *Hughes v. United States*, App. D.C., 308 A.2d 238 (1973).

Indefinite commitment as sexual psychopath is justifiable only upon theory of therapeutic treatment. *Millard v. Cameron*, 373 F.2d 468 (D.C. Cir. 1966); *Clatterbuck v. Harris*, 295 F. Supp. 84 (D.D.C. 1968).

Incarceration of sexual psychopath in a place for the criminal, hopeless insane is not authorized. *Miller v. Overholser*, 206 F.2d 415 (D.C. Cir. 1953).

Court may permit psychopath to remain at liberty pending appeal. — The court has the power to permit one adjudged a sexual psychopath to remain at liberty on bond pending an appeal. *Carras v. District of Columbia*, App. D.C., 183 A.2d 393 (1962).

Court determines whether habeas petitioner dangerous. — If the court determines that a habeas petitioner is not mentally ill, then it must decide whether he is dangerous to other persons, and a finding of dangerousness must be based on a high probability of substantial injury. *Cross v. Harris*, 418 F.2d 1095 (D.C. Cir. 1969).

Cited in *Lomax v. District of Columbia*, App. D.C., 211 A.2d 772 (1965).

§ 22-3509. Parole; discharge.

Any person committed under §§ 22-3503 to 22-3511 may be released from confinement when an appropriate supervisory official finds that he or she has sufficiently recovered so as to not be dangerous to other persons, provided if the person to be released be one charged with crime or undergoing sentence therefor, that official shall give notice thereof to the judge of the criminal court and deliver him or her to the court in obedience to proper precept. (June 9, 1948, 62 Stat. 349, ch. 428, title II, § 207; 1973 Ed., § 22-3509; Nov. 8, 1984, 98 Stat. 3369, Pub. L. 98-621, § 10(t)(2); May 21, 1994, D.C. Law 10-119, § 20(g), 41 DCR 1639.)

Section references. — This section is referred to in §§ 22-3503, 22-3505 to 22-3508, 22-3510 and 22-3511.

Effect of amendments. — D.C. Law 10-119 inserted “or she” and “or her.”

Legislative history of Law 10-119. — See note to § 22-3503.

Section constitutional. — The standards provided for the release of a sexual psychopath from a hospital are not so vague as to invalidate this section. *Miller v. Overholser*, 206 F.2d 415 (D.C. Cir. 1953).

Sexual psychopath may test recovery by habeas proceeding. — One committed as a

sexual psychopath to a hospital for the insane may at any time after commitment test by a habeas corpus proceeding the question of whether he has recovered. *Malone v. Overholzer*, 93 F. Supp. 647 (D.D.C. 1950).

And relief available for unsuitable and inadequate treatment. — Habeas corpus relief is available to one involuntarily committed to a public hospital as a sexual psychopath but who is not receiving reasonably suitable and adequate treatment. *Millard v. Cameron*, 373 F.2d 468 (D.C. Cir. 1966).

§ 22-3510. Stay of criminal proceedings.

Any statement filed in a criminal proceeding pursuant to subsection (b) or (c) of § 22-3504 shall stay such criminal proceeding until whichever of the following first occurs:

(1) The proceeding under §§ 22-3503 to 22-3511 to determine whether the patient is a sexual psychopath is dismissed pursuant to § 22-3507 or withdrawn;

(2) It is determined pursuant to § 22-3508 that the patient is not a sexual psychopath; or

(3) The patient is discharged from an institution pursuant to § 22-3509. (June 9, 1948, 62 Stat. 349, ch. 428, title II, § 208; 1973 Ed., § 22-3510; Nov. 8, 1984, 98 Stat. 3369, Pub. L. 98-621, § 10(t)(3).)

Section references. — This section is referred to in §§ 22-3503, 22-3505 to 22-3507, 22-3509 and 22-3511.

Effective date of § 10 of Pub. L. 98-621. — See note to § 22-3508.

§ 22-3511. Criminal law unchanged.

Nothing in §§ 22-3503 to 22-3510 shall alter in any respect the tests of mental capacity applied in criminal prosecutions under the laws of the District of Columbia. (June 9, 1948, 62 Stat. 350, ch. 428, title II, § 209; 1973 Ed., § 22-3511.)

Section references. — This section is referred to in §§ 22-3503, 22-3505 to 22-3507, 22-3509 and 22-3510.

CHAPTER 36. IMPLEMENTS OF CRIME.

Sec.

22-3601. Possession of implements of crime;
penalty.

§ 22-3601. Possession of implements of crime; penalty.

No person shall have in his or her possession in the District any instrument, tool, or implement for picking locks or pockets, with the intent to use such instrument, tool, or implement to commit a crime. Whoever violates this section shall be imprisoned for not more than 180 days and may be fined not more than \$1,000, unless the violation occurs after he or she has been convicted in the District of a violation of this section or of a felony, either in the District or another jurisdiction, in which case he or she shall be imprisoned for not less than 1 year nor more than 5 years. (June 29, 1953, 67 Stat. 97, ch. 159, § 209(a); 1973 Ed., § 22-3601; Aug. 5, 1981, D.C. Law 4-29, § 604(a)(2), 28 DCR 3081; Nov. 17, 1981, D.C. Law 4-52, § 3(g), 28 DCR 4348; May 21, 1994, D.C. Law 10-119, § 9(c), 41 DCR 1639; Aug. 20, 1994, D.C. Law 10-151, § 110(b), 41 DCR 2608.)

Cross references. — As to definition of District, see § 1-202.

As to drug paraphernalia offenses, see Chapter 6 of Title 33.

Section references. — This section is referred to in § 24-203.

Effect of amendments. — D.C. Law 10-119 inserted “or her” in the first sentence; and inserted “or she” twice in the second sentence.

D.C. Law 10-151 substituted “180 days” for “1 year” in the second sentence.

Emergency act amendments. — For temporary amendment of section, see § 110(b) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 4-29. — Law 4-29, the “District of Columbia Uniform Controlled Substances Act of 1981,” was introduced in Council and assigned Bill No. 4-123, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on May 5, 1981, and May 19, 1981, respectively. Signed by the Mayor on June 9, 1981, it was assigned Act No. 4-51 and transmitted to both Houses of Congress for its review.

Legislative history of Law 4-52. — Law 4-52, the “Minors Health Consent Regulation, District of Columbia Sexual Assault Reform Act of 1981, District of Columbia Uniform Controlled Substances Act of 1981, Traffic Act Amendments Act of 1981, District of Columbia Traffic Adjudication Act, District of Columbia Law Enforcement Act, and Statehood Constitutional Convention Initiative of 1979 Amendment of 1981 was introduced in Council and

assigned Bill No. 4-270, which was referred to the Committee on Human Services. The Bill was adopted on first and second readings on July 28, 1981 and September 15, 1981 respectively. Signed by the Mayor on September 25, 1981, it was assigned Act No. 4-89 and transmitted to both Houses of Congress for its review.

Legislative history of Law 10-119. — Law 10-119, the “Anti-Gender Discriminatory Language Criminal Offenses Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-332, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 1, 1994, and March 1, 1994, respectively. Signed by the Mayor on March 17, 1994, it was assigned Act No. 10-209 and transmitted to both Houses of Congress for its review. D.C. Law 10-119 became effective on May 21, 1994.

Legislative history of Law 10-151. — Law 10-151, the “Omnibus Criminal Justice Reform Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

Section is not unconstitutionally vague. McKoy v. United States, App. D.C., 263 A.2d 645 (1970); Tompkins v. United States, App. D.C., 272 A.2d 100 (1970).

Legislative intent. — The Council intended in D.C. Law 4-29 to repeal this section solely as it applied to narcotics paraphernalia and to substitute therefor § 33-550, a specific narcotics paraphernalia possession provision. *United States v. Covington*, App. D.C., 459 A.2d 1067 (1983).

"Satisfactory account" clause of this section does not violate the privilege against self-incrimination because of its availability as an affirmative defense. *McKoy v. United States*, App. D.C., 263 A.2d 645 (1970).

And constitutional as applied to narcotics paraphernalia. — This section is constitutional as applied to a nonmedical person who, on arrest, is found to be in possession of a wet needle, a needle holder and a syringe. *McKoy v. United States*, App. D.C., 263 A.2d 649 (1970).

The constitutional prohibition against cruel and unusual punishments does not prevent a conviction for possession of narcotics paraphernalia. *Wheeler v. United States*, App. D.C., 276 A.2d 722 (1971).

In view of the narrowing interpretation to which this section has been subjected by the courts, this section, as applied to narcotics implements, is not vague and overbroad. *James v. United States*, App. D.C., 350 A.2d 748, cert. denied, 429 U.S. 872, 97 S. Ct. 186, 50 L. Ed. 2d 152 (1976).

This section has broad applicability, extending to the possession of narcotics paraphernalia, the mere possession of which clearly implies criminal intent. *Williams v. United States*, App. D.C., 427 A.2d 901 (1980), cert. denied, 450 U.S. 1043, 101 S. Ct. 1763, 68 L. Ed. 2d 241 (1981).

But unconstitutional as applied to "unsinister" implements. — This section is unconstitutional as applied to implements which do not in themselves give rise to sinister implications. *Benton v. United States*, 232 F.2d 341 (D.C. Cir. 1956).

Section is unconstitutional in its application to crowbars. *Washington v. United States*, 232 F.2d 357 (D.C. Cir. 1956).

And violates due process. — This section, which places upon the defendant the burden of showing the innocent nature of his possession, does violate due process. *James v. United States*, App. D.C., 350 A.2d 748, cert. denied, 429 U.S. 872, 97 S. Ct. 186, 50 L. Ed. 2d 152 (1976).

Congress' avowed intent is to prosecute and convict all drug users. *Gorham v. United States*, App. D.C., 339 A.2d 401 (1975).

Reasonable to infer dominion over implements under car seat. — It is reasonable to infer that the defendant has dominion and control over a needle and syringe under his car seat. *Crawford v. United States*, App. D.C., 278 A.2d 125 (1971).

To convict under this section, the government must prove that the implements are usually or reasonably may be employed in the commission of a crime, and that the defendant intended to use them for a crime. *McKoy v. United States*, App. D.C., 263 A.2d 649 (1970).

Defendant can be convicted of possession of narcotics paraphernalia under this section. *Wheeler v. United States*, App. D.C., 276 A.2d 722 (1971).

Crowbar, pliers and screwdriver not tools of crime. — A small crowbar, a pair of pliers and a screwdriver are not tools as are usually employed or reasonably may be employed in the commission of a crime. *Green v. District of Columbia*, App. D.C., 91 A.2d 712 (1952).

Neither are materials providing bulk to heroin. — Lactose, dextrose, quinine and gelatin capsules, even though possessing special properties for providing bulk to heroin, are not "instruments," "tools" or "implements" of crime. *Rosenberg v. United States*, App. D.C., 297 A.2d 763 (1972).

"Satisfactory account" defined. — A "satisfactory account," within the meaning of this section, means a lawful purpose for possessing an implement. *McKoy v. United States*, App. D.C., 263 A.2d 645 (1970).

Validity of presumption depends on rational connection. — The validity of the presumption created by this section depends on the presence of a rational connection between the facts proved and the ultimate fact presumed. *Benton v. United States*, 232 F.2d 341 (D.C. Cir. 1956).

Proof of intent is an essential element of the government's case. *Benton v. United States*, 232 F.2d 341 (D.C. Cir. 1956).

And inferred from possession of "sinister" items. — Proof of intent to possess narcotics paraphernalia may be inferred from the possession of "sinister" items. *Rosser v. United States*, App. D.C., 313 A.2d 876 (1974).

But not from mere possession of criminal tools. — No rational inference of criminal intent can be drawn from the mere possession of tools which reasonably may be employed in a crime. *Benton v. United States*, 232 F.2d 341 (D.C. Cir. 1956).

Use of surrounding circumstances to establish requisite criminal intent. — The use of surrounding circumstances, such as evidence of defendant's marijuana smoking habits, is allowable to establish the requisite criminal intent, beyond mere possession, that must be proved in order to sustain a conviction for possession of narcotics paraphernalia. *Williams v. United States*, App. D.C., 427 A.2d 901 (1980), cert. denied, 450 U.S. 1043, 101 S. Ct. 1763, 68 L. Ed. 2d 241 (1981).

Use of narcotics "kit" supplies criminal intent. — The fact that the only possible use of

a complete narcotics "kit" is to administer heroin supplies the requisite criminal intent to use this implement in a crime. *McKoy v. United States*, App. D.C., 263 A.2d 645 (1970).

Penalties prescribed by § 33-550 govern case involving narcotics paraphernalia possession reversed and remanded after August 1981. — While a defendant's prosecution under this section prior to August 5, 1981, remains unaffected by D.C. Law 4-29 (which repealed this section, placing possession of narcotics paraphernalia under § 33-550), when defendant's case was reversed and remanded after August 1981, the case fell within the sentencing guidelines of § 33-561 so that the court on remand should adhere to the lesser penalties in § 33-550 rather than the greater penalties under this section. *United States v. Covington*, App. D.C., 459 A.2d 1067 (1983).

Inability to form intent is not a defense to possession of narcotics implements. *James v. United States*, App. D.C., 350 A.2d 748, cert. denied, 429 U.S. 875, 97 S. Ct. 186, 50 L. Ed. 2d 152 (1976).

Police obligated to arrest narcotics offender immediately. — When police detectives see narcotics paraphernalia in someone's possession, they are under a duty to arrest the offender immediately. *Keith v. United States*, App. D.C., 232 A.2d 92 (1967).

Reasonable to seize implement incidental to authorized search. — It is not unreasonable for police officers to seize a pistol incidental to an authorized search for narcotics. *Curtis v. United States*, App. D.C., 263 A.2d 653 (1970).

And under plain view doctrine. — If narcotics paraphernalia is visible from a doorway which is open, a police officer may seize it under the plain view doctrine. *Wheeler v. United States*, App. D.C., 300 A.2d 713 (1973).

Warrantless entry justified by exigencies of situation. — Where officers making a routine check at a hotel notice a readily apparent and accessible crack in a door and look through and observe narcotics paraphernalia, their warrantless entry is justified by the exigencies of the situation. *Borum v. United States*, App. D.C., 318 A.2d 590 (1974).

Arrestee must be warned of constitutional rights. — The defendant arrested for possession of implements of crime must be warned of his constitutional rights by the arresting officers before he makes any admissible incriminating statements. *Johnson v. United States*, App. D.C., 255 A.2d 494 (1969).

Where no motion to suppress, admission of implement not error. — In view of the failure to move to suppress narcotics paraphernalia before trial, absent showing of plain error, its admission into evidence is not error. *Brown v. United States*, App. D.C., 289 A.2d 891 (1972).

And admission proper where arrest legal. — Where an arrest for narcotics violations is legal, narcotics paraphernalia seized at the time of the arrest is properly admitted. *Keith v. United States*, App. D.C., 232 A.2d 92 (1967).

Where probable cause is established, narcotics seized at the time of arrest do not need to be suppressed. *Banks v. United States*, App. D.C., 305 A.2d 256 (1973).

Granting motion to suppress evidence is proper where arrest was unreasonable and premature. *United States v. Brown*, App. D.C., 294 A.2d 499 (1972).

Burden of proof. — It is not incumbent on the prosecution in a case involving possession of implements of crime to show that the defendant is unable to satisfactorily account for their possession. *Johnson v. United States*, App. D.C., 255 A.2d 494 (1969).

Where legitimate reasons for possession, tools improperly admitted. — Where the defendant gives legitimate reasons for possession of tools, they are improperly received in evidence against him. *Green v. District of Columbia*, App. D.C., 91 A.2d 712 (1952).

Possession of narcotics implements tends to establish trustworthiness of admission. — Although possession of a wet needle, needle holder and syringe, but not the cooker, might not be sufficient to establish the corpus delicti, it does constitute substantial independent evidence which would tend to establish the trustworthiness of an admission by the defendant. *McKoy v. United States*, App. D.C., 263 A.2d 645 (1970).

Each case of possession of narcotics paraphernalia must be governed by own facts. *Jones v. United States*, App. D.C., 282 A.2d 561 (1971).

Evidence sufficient to sustain conviction. — The defendant's possession of a syringe, needle, and soda bottle top containing traces of heroin is sufficient for a jury to find possession of narcotics paraphernalia. *Richardson v. United States*, App. D.C., 276 A.2d 237 (1971).

Proof of possession of a syringe containing liquid with more than the traces of heroin is sufficient to sustain a conviction for possession of implements of crime. *Jones v. United States*, App. D.C., 282 A.2d 561 (1971).

Evidence that narcotics paraphernalia was discovered in a room in which was found a notebook containing sale records in the defendant's handwriting is sufficient to sustain a conviction of possession of implements of crime. *Mahoney v. United States*, App. D.C., 295 A.2d 895 (1972).

Evidence sustains a conviction of possession of narcotics paraphernalia where substances shown to be used in "cutting" and injecting heroin were found. *Rosser v. United States*, App. D.C., 313 A.2d 876 (1974).

Evidence insufficient to sustain conviction. — The possession of a small wooden pipe, without further evidence as to its shape and size and absent any evidence as to the nature and significance of marijuana residue found within, is not sufficient to support a conviction of possessing implement of crime. *Williams v. United States*, App. D.C., 304 A.2d 287 (1973).

Where concurrent sentence supported by sufficient evidence, other convictions not examined. — Where the defendants receive concurrent sentences in a prosecution for possession of narcotics, possession of implements of crime, unlawful entry and narcotics vagrancy and the evidence is sufficient to support a conviction of possession of narcotics and possession of implements of crime, the appellate court will not pass upon the sufficiency of the evidence to support the other convictions. *Keith v. United States*, App. D.C., 232 A.2d 92 (1967).

Cited in *West v. United States*, App. D.C., 249 A.2d 740 (1969); *Cook v. United States*, App. D.C., 272 A.2d 444 (1971); *Jones v. United States*, App. D.C., 273 A.2d 842 (1971); *McIver v. United States*, App. D.C., 280 A.2d 527 (1971); *Rutledge v. United States*, App. D.C.,

283 A.2d 213 (1971); *United States v. Oliver*, App. D.C., 297 A.2d 778 (1972); *McWilliams v. United States*, App. D.C., 298 A.2d 38 (1972); *Tyler v. United States*, App. D.C., 298 A.2d 224 (1972); *United States v. Mitchell*, App. D.C., 299 A.2d 540 (1973); *Thompson v. United States*, App. D.C., 307 A.2d 764 (1973); *Franklin v. United States*, App. D.C., 339 A.2d 398 (1975); *Hockaday v. United States*, App. D.C., 359 A.2d 146 (1976); *Hooker v. United States*, App. D.C., 372 A.2d 996 (1977); *Ford v. United States*, App. D.C., 376 A.2d 439 (1977); *Haltiwanger v. United States*, App. D.C., 377 A.2d 1142 (1977); *In re J.G.J.*, App. D.C., 388 A.2d 472 (1978); *Lampkins v. United States*, App. D.C., 401 A.2d 966 (1979); *Smith v. District of Columbia*, App. D.C., 436 A.2d 53 (1981); *United States v. Anderson*, 670 F.2d 328 (D.C. Cir. 1982); *United States v. Lyons*, App. D.C., 448 A.2d 872 (1982); *Rucker v. United States*, App. D.C., 455 A.2d 889 (1983); *Bigelow v. United States*, App. D.C., 498 A.2d 210 (1985); *United States v. Laws*, 808 F.2d 92 (D.C. Cir. 1986); *United States v. Duncan*, 115 WLR 2517 (Super. Ct. 1987); *Bigelow v. Knight*, 737 F. Supp. 669 (D.D.C. 1990).

CHAPTER 37. WAREHOUSE RECEIPTS.

Sec.

22-3701 to 22-3706. [Repealed].

§§ 22-3701 to 22-3706. Issue of receipt for goods not received; issue of receipt containing false statement; issue of duplicate receipts not so marked; issue of receipt that does not state warehouseman's ownership of goods; delivery of goods without obtaining negotiable receipts; negotiation of receipt for mortgaged goods.

Repealed. Dec. 1, 1982, D.C. Law 4-164, § 602(aaa)-(fff), 29 DCR 3976.

Cross references. — As to theft and fraud, see Chapter 38 of this title.

Legislative history of Law 4-164. — Law 4-164, the "District of Columbia Theft and White Collar Crimes Act of 1982," was introduced in Council and assigned Bill No. 4-133, which was referred to the Committee on the

Judiciary. The Bill was adopted on first, amended first and second readings on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.

CHAPTER 38. THEFT; FRAUD.

Subchapter I. General Provisions.

Sec.

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22-3811. Theft.

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Subchapter III. Fraud; Related Offenses.

Sec.

22-3821. Fraud.

22-3822. Penalties for fraud.

22-3823. Credit card fraud.

22-3824. Fraudulent registration.

Subchapter IV. Stolen Property.

22-3831. Trafficking in stolen property.

22-3832. Receiving stolen property.

Subchapter V. Forgery.

22-3841. Forgery.

22-3842. Penalties for forgery.

Subchapter VI. Extortion.

22-3851. Extortion.

22-3852. Blackmail.

*Subchapter I. General Provisions.***§ 22-3801. Definitions.**

For the purposes of this chapter, the term:

(1) "Appropriate" means to take or make use of without authority or right.

(2) "Deprive" means:

(A) To withhold property or cause it to be withheld from a person permanently or for so extended a period or under such circumstances as to acquire a substantial portion of its value; or

(B) To dispose of the property, or use or deal with the property so as to make it unlikely that the owner will recover it.

(3) "Property" means anything of value. The term "property" includes, but is not limited to:

(A) Real property, including things growing on, affixed to, or found on land;

(B) Tangible or intangible personal property; and

(C) Services.

(4) "Property of another" means any property in which a government or a person other than the accused has an interest which the accused is not privileged to interfere with or infringe upon without consent, regardless of whether the accused also has an interest in that property. The term "property of another" includes the property of a corporation or other legal entity established pursuant to an interstate compact. The term "property of another" does not include any property in the possession of the accused as to which any other person has only a security interest.

(5) "Services" includes, but is not limited to:

(A) Labor, whether professional or nonprofessional;

(B) The use of vehicles or equipment;

(C) Transportation, telecommunications, energy, water, sanitation, or other public utility services, whether provided by a private or governmental entity;

(D) The supplying of food, beverage, lodging, or other accommodation in hotels, restaurants, or elsewhere;

(E) Admission to public exhibitions or places of entertainment; and

(F) Educational and hospital services, accommodations, and other related services.

(6) "Stolen property" includes any property that has been obtained by conduct previously known as embezzlement. (Dec. 1, 1982, D.C. Law 4-164, § 101, 29 DCR 3976.)

Cross references. — As to adult protective services, see Chapter 25 of Title 6.

Section references. — This section is referred to in § 6-2501.

Legislative history of Law 4-164. — Law 4-164, the "District of Columbia Theft and White Collar Crimes Act of 1982," was introduced in Council and assigned Bill No. 4-133, which was referred to the Committee on the Judiciary. The Bill was adopted on first, amended first and second readings on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.

Purpose. — The overall purpose of redrafting the theft and fraud-related statutes in the District was to revise and modernize the District criminal laws relating to forgery. *Driver v. United States*, App. D.C., 521 A.2d 254 (1987).

"Property" construed. — The suggestion that misappropriated electric current is not within the definition of property would surely fly in the face of an unambiguous legislative intention to interdict wrongful takings of anything of value. *United States v. Gray*, 115 WLR 265 (Super. Ct. 1987).

Value of property. — In trials where the illegal taking or possession of a piece of property is an issue, to establish "value," the government need not prove the item's specific monetary worth; rather, it only need show that the item had some value. *Jeffcoat v. United States*, App. D.C., 551 A.2d 1301 (1988).

The value of an item is to be determined by its "useful functional purpose." *Jeffcoat v. United States*, App. D.C., 551 A.2d 1301 (1988).

The value of property is determined at the time the crime through which it is acquired occurs. *Jeffcoat v. United States*, App. D.C., 551 A.2d 1301 (1988).

Proof of "property of another" in shoplifting prosecution. — The definition of "property of another" in paragraph (4) of this section does not require the government in a shoplifting prosecution to prove that the stolen property is not merchandise in which the only interest held by another is a security interest. *Alston v. United States*, App. D.C., 509 A.2d 1129 (1986).

Cited in *In re Kent*, App. D.C., 467 A.2d 982 (1983); *Tibbs v. United States*, App. D.C., 507 A.2d 141 (1986); *United States v. Brown*, 120 WLR 697 (Super. Ct. 1992).

§ 22-3802. Aggregation of amounts received to determine grade of offense.

Amounts received pursuant to a single scheme or systematic course of conduct in violation of § 22-3811 (Theft), § 22-3821 (Fraud), or § 22-3823 (Credit Card Fraud) may be aggregated in determining the grade of the offense and the sentence for the offense, except that with respect to credit card fraud only amounts received within a consecutive 7-day period may be aggregated. (Dec. 1, 1982, D.C. Law 4-164, § 102, 29 DCR 3976; Aug. 2, 1983, D.C. Law 5-24, § 6, 30 DCR 3341.)

Legislative history of Law 4-164. — See note to § 22-3801.

Legislative history of Law 5-24. — Law 5-24, the "Technical and Clarifying Amend-

ments Act of 1983," was introduced in Council and assigned Bill No. 5-169, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on May

10, 1983, and May 24, 1983, respectively. assigned Act No. 5-41 and transmitted to both
Signed by the Mayor on June 9, 1983, it was Houses of Congress for its review.

§ 22-3803. Consecutive sentences.

No person shall be consecutively sentenced for the same act or course of conduct for the following:

- (1) Theft and fraud;
- (2) Theft and unauthorized use of a vehicle; or
- (3) Theft and commercial piracy. (Dec. 1, 1982, D.C. Law 4-164, § 103, 29 DCR 3976.)

Cross references. — As to theft, see § 22-3811.

As to commercial piracy, see § 22-3814.

As to unauthorized use of motor vehicles, see § 22-3815.

As to fraud, see § 22-3821.

Legislative history of Law 4-164. — See note to § 22-3801.

This section does not prohibit convictions for both receiving stolen property and unauthorized use of a vehicle, but only the imposition of consecutive sentences. *Byrd v. United States*, App. D.C., 598 A.2d 386 (1991).

Cited in *United States v. Brown*, 120 WLR 697 (Super. Ct. 1992).

Subchapter II. Theft; Related Offenses.

§ 22-3811. Theft.

(a) For the purpose of this section, the term “wrongfully obtains or uses” means: (1) Taking or exercising control over property; (2) making an unauthorized use, disposition, or transfer of an interest in or possession of property; or (3) obtaining property by trick, false pretense, false token, tampering, or deception. The term “wrongfully obtains or uses” includes conduct previously known as larceny, larceny by trick, larceny by trust, embezzlement, and false pretenses.

(b) A person commits the offense of theft if that person wrongfully obtains or uses the property of another with intent:

(1) To deprive the other of a right to the property or a benefit of the property; or

(2) To appropriate the property to his or her own use or to the use of a third person.

(c) In cases in which the theft of property is in the form of services, proof that a person obtained services that he or she knew or had reason to believe were available to him or her only for compensation and that he or she departed from the place where the services were obtained knowing or having reason to believe that no payment had been made for the services rendered in circumstances where payment is ordinarily made immediately upon the rendering of the services or prior to departure from the place where the services are obtained, shall be prima facie evidence that the person had committed the offense of theft. (Dec. 1, 1982, D.C. Law 4-164, § 111, 29 DCR 3976.)

Cross references. — As to Merchant's Civil Recovery for Criminal Conduct, see § 3-441 et seq.

As to penalties for violation of Medicaid Provider Fraud Prevention Act, see § 3-702.

As to prohibition of consecutive sentences for theft and certain other crimes, see § 22-3803.

As to trafficking in stolen property, see § 22-3831.

As to receiving stolen property, see § 22-3832.

As to forgery, see § 22-3841.

As to enhanced penalty for crimes committed against senior citizen victims, see § 22-3901.

Section references. — This section is referred to in §§ 3-441 and 22-3802.

Legislative history of Law 4-164. — See note to § 22-3801.

Right to speedy trial not violated. — In a prosecution for first degree theft and second degree burglary, appellant failed to show that his right to a speedy trial was violated where most of the almost twenty-four months of delay between appellant's arrest and trial was due to neutral reasons and was therefore charged against the government, where there was no indication that the government deliberately delayed in an attempt to gain a tactical advantage, where appellant did not assert his right to a speedy trial explicitly, clearly, early, and without ulterior motive to merely shorten his confinement on another charge, and where appellant did not show prejudice caused by the delay. *Turner v. United States*, App. D.C., 622 A.2d 667 (1993).

Conviction under Theft and White Collar Crimes Act of 1982 upheld. — Council had authority to pass the Theft and White Collar Crimes Act of 1982 because the unconstitutional one-house veto provision of the Home Rule Act, found in § 1-233(c)(2), is severable from the rest of the act; and therefore, a defendant was properly convicted under this section. *United States v. Davis*, 112 WLR 2249 (Super. Ct. 1984). As to the severability of the D.C. Self-Government and Governmental Reorganization Act, see § 762 of that act in volume 1. As to validity of certain amendments of D.C. Self-Government and Governmental Reorganization Act, see § 131(k) of Pub. L. 98-473.

Showing ownership unnecessary to prove larceny. — Larceny is a crime against possession and in order to prove the offense, the government need not show ownership. *McEachin v. United States*, App. D.C., 432 A.2d 1212 (1981).

Elements of false pretenses. — To convict a defendant for the crime of false pretenses, the government must prove that the defendant made a false representation with knowledge of its falsity and an intent to defraud; that the defrauded party relied on the misrepresentation; and that the defendant obtained (title to)

something of value as a result of the misrepresentation. *Blackledge v. United States*, App. D.C., 447 A.2d 46 (1982).

False pretense or representation must relate to existing or past fact and a false promise to produce a future result does not constitute a false representation. *Blackledge v. United States*, App. D.C., 447 A.2d 46 (1982).

False representation may be oral or written, or it may be implied from conduct. *Blackledge v. United States*, App. D.C., 447 A.2d 46 (1982).

Presentation of check is implied representation of its validity. *Stepney v. United States*, App. D.C., 443 A.2d 555 (1982).

Unauthorized use of credit card could be violation of former § 22-1301. — Where a false pretenses charge stems from the unauthorized use of a credit card, it is not necessarily significant that the credit card was presented immediately after rather than just prior to receipt of the goods in what is virtually a simultaneous exchange. *Blackledge v. United States*, App. D.C., 447 A.2d 46 (1982).

An initial implicit false promise of lawful payment coupled with the presentation of a stolen credit card, which occur in a single and continuous transaction, can support a conviction for false pretenses or attempted false pretenses, provided that together they induce or would have induced the victim to surrender title to the property. *Blackledge v. United States*, App. D.C., 447 A.2d 46 (1982).

Wrongfully obtained funds. — From the evidence a reasonable jury could infer that defendant wrongfully obtained union funds for his own benefit by making and cashing checks against union policy and without union authorization. Moreover, since no one in the union had knowledge of the checks and the defendant did not produce receipts for union expenses to justify the checks, a reasonable jury could infer that the defendant did not use the funds for union activities. *Johnson v. United States*, App. D.C., 613 A.2d 1381 (1992).

Larceny is a lesser included offense of robbery and armed robbery. *Ulmer v. United States*, App. D.C., 649 A.2d 295 (1994).

Instruction on lesser included offense not required. — Where a jury could only have found defendant guilty of robbery, the trial court did not err in refusing to give the jury an instruction on the lesser included offense of larceny. *Ulmer v. United States*, App. D.C., 649 A.2d 295 (1994).

Indictment is not defective because it alleges theft from bank instead of from individual customers; deposits in banks become property of the bank, creating only a simple debtor-creditor relationship between bank and depositor. *Roberts v. United States*, App. D.C., 508 A.2d 110 (1986), overruled on

other grounds, *Byrd v. United States*, App. D.C., 598 A.2d 386 (1991).

Government meets possession burden in larceny prosecution by showing possessor has greater rights in property. — To negate the thief's right to take property, and to protect him from a second prosecution for the same offense, the government can carry its burden of showing possession in a larceny prosecution by proving only that the possessor has greater rights in the property than the accused. *McEachin v. United States*, App. D.C., 432 A.2d 1212 (1981).

Defendant's latent fingerprints recovered from can of air freshener found near point of unlawful entry into a residence were insufficient as the only evidence of guilt to support a conviction for burglary and theft. In re J.C.M., App. D.C., 502 A.2d 472 (1985).

Victim's statements held insufficient to identify defendant. — See In re J.C.M., App. D.C., 502 A.2d 472 (1985).

Proof of intent in prosecution for attempted false pretenses. — In a prosecution for attempted false pretenses, it is not necessary in order to establish an intent that the potential victim was deceived and had parted with something of value. *Blackledge v. United States*, App. D.C., 447 A.2d 46 (1982).

Damages award in civil action does not estop government from criminal prosecution. — Jury award of damages for conversion in civil action between 2 private parties does not collaterally estop the government from further criminal prosecution on the issue of ownership. *United States v. Lima*, App. D.C., 424 A.2d 113 (1980).

Merger of offenses. — A conviction for unauthorized use of a motor vehicle merges with a conviction for theft of the same car. *Galberth v. United States*, App. D.C., 590 A.2d 990 (1991).

Conviction for unauthorized use of a vehicle did not merge with a robbery conviction, and a theft conviction did not merge with a burglary conviction, as each conviction required a different element of proof. *Matthews v. United States*, App. D.C., 629 A.2d 1185 (1993).

No aggregation of misdemeanors to reach threshold required for jury trial. — The Superior Court would not aggregate the penalties for multiple misdemeanor offenses charged in order to reach the threshold penalty required for a jury trial. *United States v. Joseph*, 122 WLR 2337 (Super. Ct. 1994).

Evidence offered to establish claim of right defense in prosecution under former § 22-1202 properly excluded. — Evidence purporting to show that other employees were allegedly improperly denied a portion of their wages by the same employer, offered to establish a claim of right defense on behalf of defendant, was properly excluded as irrelevant.

Robertson v. United States, App. D.C., 429 A.2d 192 (1981).

Evidence held sufficient. — Evidence held sufficient to sustain defendant's conviction. *Matthews v. United States*, App. D.C., 629 A.2d 1185 (1993).

Evidence of defendant's unauthorized presence in building with former defendant shortly after the police responded to a burglar alarm, and evidence of footprints, burglary tools, bags of tapes, and damage to the door and burglar alarm in the store, combined with the evasive actions of the two men upon seeing the police, were sufficient to support a reasonable inference that the former codefendant perpetrated second degree burglary, destroying property, and second degree theft. *Wright v. United States*, App. D.C., 637 A.2d 95 (1994).

Former § 22-1301 cited in United States v. Coats, 652 F.2d 1002 (D.C. Cir. 1981); *United States v. Gambler*, 662 F.2d 834 (D.C. Cir. 1981).

Former § 22-2201 cited in United States v. Stancil, App. D.C., 422 A.2d 1285 (1980); *United States v. Luck*, 664 F.2d 311 (D.C. Cir. 1981); *Carpenter v. United States*, App. D.C., 430 A.2d 496, cert. denied, 454 U.S. 852, 102 S. Ct. 295, 70 L. Ed. 2d 143 (1981); In re Inquiry into Cedar Knoll Inst., App. D.C., 430 A.2d 1087 (1981); *Prince v. United States*, App. D.C., 432 A.2d 720 (1981); *Samuels v. United States*, App. D.C., 435 A.2d 392 (1981); *Asbell v. United States*, App. D.C., 436 A.2d 804 (1981); *Wesley v. United States*, App. D.C., 449 A.2d 282 (1982); *Parker v. United States*, App. D.C., 449 A.2d 1076 (1982).

Former § 22-2202 cited in Wilkerson v. United States, App. D.C., 432 A.2d 730, cert. denied, 454 U.S. 1090, 102 S. Ct. 654, 70 L. Ed. 2d 628 (1981); *Mackey v. United States*, App. D.C., 451 A.2d 887 (1982).

Former § 22-2203 cited in United States v. Gambler, 662 F.2d 834 (D.C. Cir. 1981).

Cited in Brooks v. United States, App. D.C., 494 A.2d 922 (1984); *United States v. Bailey*, App. D.C., 495 A.2d 756 (1985); *Tyler v. United States*, App. D.C., 495 A.2d 1180 (1985); *Wright v. United States*, App. D.C., 508 A.2d 915 (1986); *United States v. Scarborough*, 813 F.2d 1244 (D.C. Cir. 1987); *Kingsbury v. United States*, App. D.C., 520 A.2d 686 (1987); *Scarborough v. United States*, App. D.C., 522 A.2d 869 (1987); *Hill v. United States*, App. D.C., 529 A.2d 788 (1987); *Gholson v. United States*, App. D.C., 532 A.2d 118 (1987); *United States v. Gray*, 115 WLR 265 (Super. Ct. 1987); *Simmons v. United States*, App. D.C., 554 A.2d 1167 (1989); *United States v. Smith*, 729 F. Supp. 1380 (D.D.C. 1990); *Norris v. United States*, App. D.C., 585 A.2d 1372 (1991); *Taylor v. United States*, App. D.C., 595 A.2d 1007 (1991); *Byrd v. United States*, App. D.C., 598 A.2d 386 (1991); *McFadden v. United States*,

App. D.C., 614 A.2d 11 (1992); *Byrd v. United States*, App. D.C., 618 A.2d 596 (1992); *Coleman v. United States*, App. D.C., 619 A.2d 40 (1993); *Norman v. United States*, App. D.C., 623 A.2d 1165 (1993); *United States v. Liboro*,

10 F.3d 861 (D.C. Cir. 1993); *Feinstone v. Potomac Group, Inc.*, 122 WLR 233 (Super. Ct. 1993); *Butler v. United States*, App. D.C., 649 A.2d 563 (1994).

§ 22-3812. Penalties for theft.

(a) *Theft in the first degree.* — Any person convicted of theft in the first degree shall be fined not more than \$5,000 or imprisoned for not more than 10 years, or both, if the value of the property obtained or used is \$250 or more.

(b) *Theft in second degree.* — Any person convicted of theft in the second degree shall be fined not more than \$1,000 or imprisoned for not more than 180 days, or both, if the value of the property obtained or used is less than \$250. (Dec. 1, 1982, D.C. Law 4-164, § 112, 29 DCR 3976; Aug. 20, 1994, D.C. Law 10-151, § 113(a), 41 DCR 2608.)

Cross references. — As to aggregation of theft, fraud, and credit card fraud offenses, see § 22-3802.

Effect of amendments. — D.C. Law 10-151 substituted “180 days” for “1 year” in (b).

Emergency act amendments. — For temporary amendment of section, see § 113(a) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 4-164. — See note to § 22-3801.

Legislative history of Law 10-151. — Law 10-151, the “Omnibus Criminal Justice Reform Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

“Value” means fair market value of property. *Eldridge v. United States*, App. D.C., 492 A.2d 879 (1985).

Right to speedy trial not violated. — In a prosecution for first degree theft and second degree burglary, appellant failed to show that his right to a speedy trial was violated where most of the almost twenty-four months of delay between appellant’s arrest and trial was due to neutral reasons and was therefore charged against the government, where there was no indication that the government deliberately delayed in an attempt to gain a tactical advantage, where appellant did not assert his right to a speedy trial explicitly, clearly, early, and without ulterior motive to merely shorten his confinement on another charge, and where appellant did not show prejudice caused by the delay.

Turner v. United States, App. D.C., 622 A.2d 667 (1993).

Testimony of store security officer, insofar as it was based on his observation of price tags, was incompetent to prove the value of the merchandise to which those tags were attached. *Eldridge v. United States*, App. D.C., 492 A.2d 879 (1985).

Merger of offenses. — Defendant’s convictions for both unauthorized use of a motor vehicle and grand larceny of the same vehicle violated the double jeopardy clause and because the unauthorized use of a vehicle conviction merged into the grand larceny conviction, the unauthorized use of a vehicle conviction must be vacated. *Garris v. United States*, App. D.C., 491 A.2d 511 (1985).

A conviction for unauthorized use of a motor vehicle merges with a conviction for theft of the same car. *Galberth v. United States*, App. D.C., 590 A.2d 990 (1991).

Conviction for unauthorized use of a vehicle did not merge with a robbery conviction, and a theft conviction did not merge with a burglary conviction, as each conviction required a different element of proof. *Matthews v. United States*, App. D.C., 629 A.2d 1185 (1993).

No aggregation of misdemeanors to reach threshold required for jury trial. — The Superior Court would not aggregate the penalties for multiple misdemeanor offenses charged in order to reach the threshold penalty required for a jury trial. *United States v. Joseph*, 122 WLR 2337 (Super. Ct. 1994).

Arnold decision prohibiting certain separate convictions is retroactive. — The constitutional interpretation by the Court of Appeals in *Arnold v. United States*, 467 A.2d 136 (1983), that the Double Jeopardy Clause of the Fifth Amendment prohibits separate convictions for grand larceny and unauthorized use of a vehicle arising out of the same trans-

action, is fully retroactive. *Kirk v. United States*, App. D.C., 510 A.2d 499 (1986).

Rejection by the Court of Appeals of a Fifth Amendment merger of offenses claim on direct appeal in an unpublished memorandum order issued prior to *Arnold v. United States*, 467 A.2d 136 (1983), does not preclude raising the issue again by way of a § 23-110 motion to vacate or correct sentence. *Kirk v. United States*, App. D.C., 510 A.2d 499 (1986).

Indictment is not defective because it alleges theft from bank instead of from individual customers; deposits in banks become property of the bank, creating only a simple debtor-creditor relationship between bank and depositor. *Roberts v. United States*, App. D.C., 508 A.2d 110 (1986), overruled on other grounds, *Byrd v. United States*, App. D.C., 598 A.2d 386 (1991).

Evidence held sufficient. — Evidence held sufficient to sustain defendant's conviction. *Matthews v. United States*, App. D.C., 629 A.2d 1185 (1993).

Former § 22-2201 cited in *United States v. Stancil*, App. D.C., 422 A.2d 1285 (1980); *United States v. Luck*, 664 F.2d 311 (D.C. Cir. 1981); *Carpenter v. United States*, App. D.C., 430 A.2d 496, cert. denied, 454 U.S. 852, 102 S. Ct. 295, 70 L. Ed. 2d 143 (1981); *In re Inquiry into Cedar Knoll Inst.*, App. D.C., 430 A.2d 1087 (1981); *Prince v. United States*, App. D.C., 432 A.2d 720 (1981); *Samuels v. United States*, App. D.C., 435 A.2d 392 (1981); *Asbell v. United States*, App. D.C., 436 A.2d 804 (1981); *Wesley v. United States*, App. D.C., 449 A.2d 282 (1982); *Parker v. United States*, App. D.C., 449 A.2d 1076 (1982).

Former § 22-2202 cited in *Wilkerson v. United States*, App. D.C., 432 A.2d 730, cert.

denied, 454 U.S. 1090, 102 S. Ct. 654, 70 L. Ed. 2d 628 (1981); *Mackey v. United States*, App. D.C., 451 A.2d 887 (1982).

Cited in *Brooks v. United States*, App. D.C., 494 A.2d 922 (1984); *United States v. Davis*, 112 WLR 2249 (Super. Ct. 1984); *United States v. Bailey*, App. D.C., 495 A.2d 756 (1985); *Tyler v. United States*, App. D.C., 495 A.2d 1180 (1985); *In re J.C.M.*, App. D.C., 502 A.2d 472 (1985); *Wright v. United States*, App. D.C., 508 A.2d 915 (1986); *United States v. Scarborough*, 813 F.2d 1244 (D.C. Cir. 1987); *Kingsbury v. United States*, App. D.C., 520 A.2d 686 (1987); *Wise v. United States*, App. D.C., 522 A.2d 898 (1987); *Hill v. United States*, App. D.C., 529 A.2d 788 (1987); *Gholson v. United States*, App. D.C., 532 A.2d 118 (1987); *United States v. Gray*, 115 WLR 265 (Super. Ct. 1987); *Jeffcoat v. United States*, App. D.C., 551 A.2d 1301 (1988); *Simmons v. United States*, App. D.C., 554 A.2d 1167 (1989); *United States v. Smith*, 729 F. Supp. 1380 (D.D.C. 1990); *Williams v. United States*, App. D.C., 571 A.2d 212 (1990); *Norris v. United States*, App. D.C., 585 A.2d 1372 (1991); *Carter v. United States*, App. D.C., 591 A.2d 233 (1991); *Taylor v. United States*, App. D.C., 595 A.2d 1007 (1991); *Harris v. United States*, App. D.C., 602 A.2d 1140 (1992); *Johnson v. United States*, App. D.C., 613 A.2d 1381 (1992); *McFadden v. United States*, App. D.C., 614 A.2d 11 (1992); *Byrd v. United States*, App. D.C., 618 A.2d 596 (1992); *Coleman v. United States*, App. D.C., 619 A.2d 40 (1993); *United States v. Liboro*, 10 F.3d 861 (D.C. Cir. 1993); *Ulmer v. United States*, App. D.C., 649 A.2d 295 (1994); *Butler v. United States*, App. D.C., 649 A.2d 563 (1994).

§ 22-3813. Shoplifting.

(a) A person commits the offense of shoplifting if, with intent to appropriate without complete payment any personal property of another that is offered for sale or with intent to defraud the owner of the value of the property, that person:

- (1) Knowingly conceals or takes possession of any such property;
- (2) Knowingly removes or alters the price tag, serial number, or other identification mark that is imprinted on or attached to such property; or
- (3) Knowingly transfers any such property from the container in which it is displayed or packaged to any other display container or sales package.

(b) Any person convicted of shoplifting shall be fined not more than \$300 or imprisoned for not more than 90 days, or both.

(c) It is not an offense to attempt to commit the offense described in this section.

(d) A person who offers tangible personal property for sale to the public, or an employee or agent of such a person, who detains or causes the arrest of a

person in a place where the property is offered for sale shall not be held liable for detention, false imprisonment, malicious prosecution, defamation, or false arrest, in any proceeding arising out of such detention or arrest, if:

(1) The person detaining or causing the arrest had, at the time thereof, probable cause to believe that the person detained or arrested had committed in that person's presence, an offense described in this section;

(2) The manner of the detention or arrest was reasonable;

(3) Law enforcement authorities were notified within a reasonable time; and

(4) The person detained or arrested was released within a reasonable time of the detention or arrest, or was surrendered to law enforcement authorities within a reasonable time. (Dec. 1, 1982, D.C. Law 4-164, § 113, 29 DCR 3976.)

Cross references. — As to Merchant's Civil Recovery for Criminal Conduct, see § 3-441 et seq.

Section references. — This section is referred to in § 3-441.

Legislative history of Law 4-164. — See note to § 22-3801.

No jury trial for shoplifting. — A person convicted of shoplifting pursuant to subsection (b) of this section may be fined not more than \$300, or sentenced to not more than 90 days imprisonment; therefore, one charged with the offense of shoplifting is not entitled to a trial by jury. *Alston v. United States*, App. D.C., 509 A.2d 1129 (1986).

Merchandise contained in storeroom. — This statute applies to merchandise contained in a storeroom off the customer sales area, which is used to replenish stock in the sales area, or which is available as a source of sizes, colors, or the like not on display in the sales area. *Harris v. United States*, App. D.C., 602 A.2d 1140 (1992).

Conceals or takes possession. — Defendant's concealment of goods and subsequent abandonment of those goods in the same area, after defendant first made an attempt to leave the area, consummated the offense of shoplift-

ing. *Baldwin v. United States*, App. D.C., 521 A.2d 650 (1987).

Proof of "property of another" in shoplifting prosecution. — The definition of "property of another" in § 22-3801(4) does not require the government in a shoplifting prosecution to prove that the stolen property is not merchandise in which the only interest held by another is a security interest. *Alston v. United States*, App. D.C., 509 A.2d 1129 (1986).

Under this section, it is not necessary for the government to prove exactly who the owner of the merchandise is, but only that the owner was someone other than the defendant. *Alston v. United States*, App. D.C., 509 A.2d 1129 (1986).

Evidence was sufficient to find that store-owned goods were the "personal property of another." *Baldwin v. United States*, App. D.C., 521 A.2d 650 (1987).

Evidence held sufficient to support conviction. — See *Carmon v. United States*, App. D.C., 498 A.2d 580 (1985); *Singletary v. United States*, App. D.C., 519 A.2d 701 (1987).

Cited in *Baxter v. United States*, App. D.C., 483 A.2d 1170 (1984); *Alston v. United States*, App. D.C., 518 A.2d 439 (1986); *Douglas v. United States*, App. D.C., 570 A.2d 772 (1990).

§ 22-3814. Commercial piracy.

(a) For the purpose of this section, the term:

(1) "Owner", with respect to phonorecords or copies, means the person who owns the original fixation of the property involved or the exclusive licensee in the United States of the rights to reproduce and distribute to the public phonorecords or copies of the original fixation. In the case of a live performance the term "owner" means the performer or performers.

(2) "Proprietary information" means customer lists, mailing lists, formulas, recipes, computer programs, unfinished designs, unfinished works of art in any medium, process, program, invention, or any other information, the primary commercial value of which may diminish if its availability is not restricted.

(3) "Phonorecords" means material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

(b) A person commits the offense of commercial piracy if, with the intent to sell, to derive commercial gain or advantage, or to allow another person to derive commercial gain or advantage, that person reproduces or otherwise copies, possesses, buys, or otherwise obtains phonorecords of a sound recording, live performance, or copies of proprietary information, knowing or having reason to believe that the phonorecord or copies were made without the consent of the owner. A presumption of the requisite intent arises if the accused possesses 5 or more unauthorized phonorecords either of the same sound recording or recording of a live performance.

(c) Nothing in this section shall be construed to prohibit:

(1) Copying or other reproduction that is in the manner specifically permitted by Title 17 of the United States Code; or

(2) Copying or other reproduction of a sound recording that is made by a licensed radio or television station or a cable broadcaster solely for broadcast or archival use.

(d) Any person convicted of commercial piracy shall be fined not more than \$1,000 or imprisoned for not more than 180 days, or both.

(e) This section does not apply to any sound recording initially fixed on or after February 15, 1972. (Dec. 1, 1982, D.C. Law 4-164, § 114, 29 DCR 3976; Aug. 20, 1994, D.C. Law 10-151, § 113(b), 41 DCR 2608; Oct. 31, 1995, D.C. Law 11-73, § 2(a), 42 DCR 3277.)

Cross references. — As to prohibition of consecutive sentences for commercial piracy and certain other crimes, see § 22-3803.

Effect of amendments. — D.C. Law 10-151 substituted "\$1,000" for "\$10,000" and substituted "180 days" for "1 year" in (d).

D.C. Law 11-73 added (e).

Temporary amendment of section. — Section 2(a) of D.C. Law 10-252 amended (a) to read as follows:

"(a) For the purpose of this section, the term:

(1) 'Owner', with respect to phonorecords or copies, means the person who owns the copyright in the original fixation of the property involved or the exclusive licensee in the United States of the rights to reproduce and distribute to the public phonorecords or copies of the original fixation. In the case of a live performance the term 'owner' means the performer or performers.

(2) 'Proprietary information' means customer lists, mailing lists, formulas, recipes, computer programs, unfinished designs, unfinished works of art in any medium, process, program, invention, or any other information,

the primary commercial value of which may diminish if its availability is not restricted.

(3) 'Phonorecords' means material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term 'phonorecords' includes the material object in which the sounds are first fixed.

(4) 'Audiovisual works' are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied. Motion pictures are audiovisual works."

Section 2(b) of D.C. Law 10-252 amended (b) to read as follows:

"(b) A person commits the offense of commercial piracy if, with the intent to sell, to derive commercial gain or advantage, or to allow an-

other person to derive commercial gain or advantage, that person reproduces or otherwise copies, possesses, buys, or otherwise obtains phonorecords or a sound recording, or copies of a live performance, audiovisual work, or proprietary information, knowing or having reason to believe that the phonorecord or copies were made without the consent of the owner. A presumption of the requisite intent arises if the accused possesses 5 or more unauthorized phonorecords or copies of audiovisual works, of 1 or more sound recordings, live performances, or audiovisual works. Anyone without knowledge or reason to believe that the audiovisual works were made without the consent of the owner shall not be subject to this act."

Section 2(c) of D.C. Law 10-252 amended (c) to read as follows:

"(c) Nothing in this section shall be construed to prohibit:

(1) Copying or other reproduction that is in the manner specifically permitted by Title 17 of the United States Code; or

(2) Copying or reproduction of a sound or video recording that is made by a licensed radio or television station or a cable broadcaster solely for broadcast or archival use."

Section 3(b) of D.C. Law 10-252 provided that

the act shall expire on the 225th day of its having taken effect.

Emergency act amendments. — For temporary amendment of section, see § 113(b) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

For temporary amendment of section, see § 2 of the Commercial Piracy Protection Emergency Amendment Act of 1994 (D.C. Act 10-363, December 15, 1994, 41 DCR 8059).

Legislative history of Law 4-164. — See note to § 22-3801.

Legislative history of Law 10-151. — See note to § 22-3812.

Legislative history of Law 10-252. — Law 10-252, the "Commercial Piracy Protection Temporary Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-846. The Bill was adopted on first and second readings on December 6, 1994, and January 3, 1995, respectively. Signed by the Mayor on January 27, 1995, it was assigned Act No. 10-399 and transmitted to both Houses of Congress for its review. D.C. Law 10-252 became effective on March 23, 1995.

Legislative history of Law 11-73. — See note to § 22-3814.1.

§ 22-3814.1. Deceptive labeling.

(a) For the purposes of this section, the term:

(1) "Audiovisual works" means material objects upon which are fixed a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, now known or later developed, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

(2) "Manufacturer" means the person who authorizes or causes the copying, fixation, or transfer of sounds or images to sound recordings or audiovisual works subject to this section.

(3) "Sound recordings" means material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

(b) A person commits the offense of deceptive labeling if, for commercial advantage or private financial gain, that person knowingly advertises, offers for sale, resale, or rental, or sells, resells, rents, distributes, or transports, or possesses for such purposes, a sound recording or audiovisual work, the label, cover, or jacket of which does not clearly and conspicuously disclose the true name and address of the manufacturer thereof.

(c) Nothing in this section shall be construed to prohibit:

(1) Any broadcaster who, in connection with, or as part of, a radio or television broadcast transmission, or for the purposes of archival preservation,

transfers any sounds or images recorded on a sound recording or audiovisual work; or

(2) Any person who, in his own home, for his own personal use, and without deriving any commercial advantage or private financial gain, transfers any sounds or images recorded on a sound recording or audiovisual work.

(d)(1) Any person convicted of deceptive labeling involving less than 1,000 sound recordings or less than 100 audiovisual works during any 180-day period shall be fined not more than \$10,000 or imprisoned for not more than 1 year, or both.

(2) Any person convicted of deceptive labeling involving 1,000 or more sound recordings or 100 or more audiovisual works during a 180-day period shall be fined not more than \$50,000 or imprisoned for not more than 5 years, or both.

(e) Upon conviction under this section, the court shall, in addition to the penalties provided by this section, order the forfeiture and destruction or other disposition of all sound recordings, audiovisual works, and equipment used, or attempted to be used, in violation of this section. (Dec. 1, 1982, D.C. Law 4-164, § 114a, as added Oct. 31, 1995, D.C. Law 11-73, § 2(b), 42 DCR 3277.)

Effect of amendments. — D.C. Law 11-73 added this section.

Legislative history of Law 11-73. — Law 11-73, the “Commercial Piracy Protection and Deceptive Labeling Amendment Act of 1995,” was introduced in Council and assigned Bill No. 11-125, which was referred to the Commit-

tee on the Judiciary. The Bill was adopted on first and second readings on May 2, 1995, and June 6, 1995, respectively. Signed by the Mayor on June 19, 1995, it was assigned Act No. 11-74 and transmitted to both Houses of Congress for its review. D.C. Law 11-73 became effective on October 31, 1995.

§ 22-3814.2. Unlawful operation of a recording device in a motion picture theater.

(a) For the purposes of this section, the term:

(1) “Motion picture theater” means a theater or other auditorium in which a motion picture is exhibited.

(2) “Recording device” means a photographic or video camera, audio or video recorder, or any other device not existing, or later developed, which may be used for recording sounds or images.

(b) A person commits the offense of unlawfully operating a recording device in a motion picture theater if, without authority or permission from the owner of a motion picture theater, or his or her agent, that person operates a recording device within the premises of a motion picture theater.

(c) Any person convicted of unlawfully operating a recording device in a motion picture theater shall be fined not more than \$300 or imprisoned for not more than 90 days, or both.

(d) A theater owner, or an employee or agent of a theater owner, who detains or causes the arrest of a person in, or immediately adjacent to, a motion picture theater shall not be held liable for detention, false imprisonment, malicious prosecution, defamation, or false arrest in any proceeding arising out of such detention or arrest, if:

(1) The person detaining or causing the arrest had, at the time thereof, probable cause to believe that the person detained or arrested had committed,

or attempted to commit, in that person's presence, an offense described in this section;

(2) The manner of the detention or arrest was reasonable;

(3) Law enforcement authorities were notified within a reasonable time; and

(4) The person detained or arrested was released within a reasonable time of the detention or arrest, or was surrendered to law enforcement authorities within a reasonable time. (Dec. 1, 1982, D.C. Law 4-164, § 114b, as added Oct. 31, 1995, D.C. Law 11-73, § 2(b), 42 DCR 3277.)

Effect of amendments. — D.C. Law 11-73 added this section.

Legislative history of Law 11-73. — See note to § 22-3814.1.

§ 22-3815. Unauthorized use of motor vehicles.

(a) For the purposes of this section, the term "motor vehicle" means any automobile, self-propelled mobile home, motorcycle, truck, truck tractor, truck tractor with semitrailer or trailer, or bus.

(b) A person commits the offense of unauthorized use of a motor vehicle under this subsection if, without the consent of the owner, that person takes, uses, operates, or removes or causes to be taken, used, operated, or removed, a motor vehicle from a garage, other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, enclosure, or space, and operates or drives or causes the motor vehicle to be operated or driven for his or her own profit, use, or purpose.

(c)(1) A person commits the offense of unauthorized use of a motor vehicle under this subsection if, after renting, leasing, or using a motor vehicle under a written agreement which provides for the return of the motor vehicle to a particular place at a specified time, that person knowingly fails to return the motor vehicle to that place (or to any authorized agent of the party from whom the motor vehicle was obtained under the agreement) within 18 days after written demand is made for its return, if the conditions set forth in paragraph (2) of this subsection are met.

(2) The conditions referred to in paragraph (1) of this subsection are as follows:

(A) The written agreement under which the motor vehicle is obtained contains the following statement: "WARNING — Failure to return this vehicle in accordance with the terms of this rental agreement may result in a criminal penalty of up to 3 years in jail". This statement shall be printed clearly and conspicuously in a contrasting color, set off in a box, and signed by the person obtaining the motor vehicle in a space specially provided;

(B) There is displayed clearly and conspicuously on the dashboard of the motor vehicle the following notice: "NOTICE — Failure to return this vehicle on time may result in serious criminal penalties"; and

(C) The party from whom the motor vehicle was obtained under the agreement makes a written demand for the return of the motor vehicle, either by actual delivery to the person who obtained the motor vehicle, or by deposit in the United States mail of a postpaid registered or certified letter, return

receipt requested, addressed to the person at each address set forth in the written agreement or otherwise provided by the person. The written demand shall state clearly that failure to return the motor vehicle may result in prosecution for violation of the criminal law of the District of Columbia punishable by up to 3 years in jail. The written demand shall not be made prior to the date specified in the agreement for the return of the motor vehicle, except that, if the parties or their authorized agents have mutually agreed to some other date for the return of the motor vehicle, then the written demand shall not be made prior to the other date.

(3) This subsection shall not apply in the case of a motor vehicle obtained under a retail installation contract as defined in § 40-1101(9).

(4) It shall be a defense in any criminal proceeding brought under this subsection that a person failed to return a motor vehicle for causes beyond his or her control. The burden of raising and going forward with the evidence with respect to such a defense shall be on the person asserting it. In any case in which such a defense is raised, evidence that the person obtained the motor vehicle by reason of any false statement or representation of material fact, including a false statement or representation regarding his or her name, residence, employment, or operator's license, shall be admissible to determine whether the failure to return the motor vehicle was for causes beyond his or her control.

(d)(1) Any person convicted of unauthorized use of a motor vehicle under subsection (b) of this section shall be fined not more than \$1,000 or imprisoned for not more than 5 years, or both.

(2) Any person convicted of unauthorized use of a motor vehicle under subsection (c) of this section shall be fined not more than \$1,000 or imprisoned for not more than 3 years, or both. (Dec. 1, 1982, D.C. Law 4-164, § 115, 29 DCR 3976; Mar. 10, 1983, D.C. Law 4-199, § 2, 30 DCR 119.)

Cross references. — As to prohibition of consecutive sentences for unauthorized use of motor vehicles and certain other crimes, see § 22-3803.

As to penalties and adjudications relating to the Compulsory/No-Fault Motor Vehicle Insurance Act, see § 35-2113.

Legislative history of Law 4-164. — See note to § 22-3801.

Legislative history of Law 4-199. — Law 4-199, the "Christmas Tree Act of 1982," was introduced in Council and assigned Bill No. 4-427, which was referred to the Committee on Human Services. The Bill was adopted on first and second readings on November 16, 1982, and December 14, 1982, respectively. Signed by the Mayor on December 28, 1982, it was assigned Act No. 4-283 and transmitted to both Houses of Congress for its review.

Moped is "motor vehicle." — A moped, a 2-wheeled vehicle equipped with both operable pedals and a small motor, is a "motor vehicle" for purposes of former § 22-2204. It is a sub-species of that category of motor vehicles gen-

erally known as motorcycles. *United States v. Stancil*, App. D.C., 422 A.2d 1285 (1980).

Merger of offenses. — Defendant may not be convicted on 2 counts of unauthorized use of a motor vehicle when jury had already returned guilty verdicts on grand larceny, not theft, charges relating to the same vehicles. *Holt v. United States*, App. D.C., 486 A.2d 705 (1985).

Defendant's convictions for both unauthorized use of a vehicle and grand larceny of the same vehicle violated the double jeopardy clause and because the unauthorized use of a vehicle conviction merged into the grand larceny conviction, the unauthorized use of a vehicle conviction must be vacated. *Garris v. United States*, App. D.C., 491 A.2d 511 (1985).

Trial court correctly held that defendant's conviction of unauthorized use of a motor vehicle merged with his conviction of receiving stolen property. *Morrison v. United States*, App. D.C., 547 A.2d 996 (1988).

Conviction for unauthorized use of a vehicle merges with the offense of receiving stolen property. *Alston v. United States*, App. D.C., 552 A.2d 526 (1989).

A conviction for unauthorized use of a motor vehicle merges with a conviction for theft of the same car. *Galberth v. United States*, App. D.C., 590 A.2d 990 (1991).

Section 22-3803 does not prohibit convictions for both receiving stolen property and unauthorized use of a vehicle, but only the imposition of consecutive sentences. *Byrd v. United States*, App. D.C., 598 A.2d 386 (1991).

Two convictions for unauthorized use of a motor vehicle merged since there was no evidence of interrupted possession. *Monroe v. United States*, App. D.C., 600 A.2d 98 (1991).

Conviction for unauthorized use of a vehicle did not merge with a robbery conviction, and a theft conviction did not merge with a burglary conviction, as each conviction required a different element of proof. *Matthews v. United States*, App. D.C., 629 A.2d 1185 (1993).

Joinder with robbery. — An analysis of the elements of unauthorized use of a motor vehicle and robbery shows that the requisite degree of similarity exists between them for joinder under Superior Court Criminal Rule 8(a). *Gooch v. United States*, App. D.C., 609 A.2d 259 (1992).

Admissibility of evidence. — Where defendant was convicted of receiving stolen property and unauthorized use of a vehicle, a statement obtained after he invoked his right to remain silent could only be admitted if legally obtained, and the trial court should have conducted a voir dire to determine whether the statement was obtained legally. *Jackson v. United States*, App. D.C., 589 A.2d 1270 (1991).

Sufficiency of evidence. — Evidence can be sufficient for a reasonable jury to infer that a defendant knew he had possession of a motor vehicle under circumstances which indicated that he had not acquired possession with the consent of the true owner, and support a conviction for unauthorized use of a motor vehicle; yet based on the same evidence, it may be impermissible speculation or conjecture on the part of a jury to infer the defendant had the specific intent to deprive the owner permanently of his property, to sustain his conviction for receiving stolen property. *United States v. Brown*, 120 WLR 697 (Super. Ct. 1992).

Evidence held sufficient to sustain defendant's conviction. *Matthews v. United States*, App. D.C., 629 A.2d 1185 (1993).

Arnold decision prohibiting certain separate convictions is retroactive. — The constitutional interpretation by the Court of Appeals in *Arnold v. United States*, 467 A.2d

136 (1983), that the Double Jeopardy Clause of the Fifth Amendment prohibits separate convictions for grand larceny and unauthorized use of a vehicle arising out of the same transaction, is fully retroactive. *Kirk v. United States*, App. D.C., 510 A.2d 499 (1986).

Rejection by the Court of Appeals of a Fifth Amendment merger of offenses claim on direct appeal in an unpublished memorandum order issued prior to *Arnold v. United States*, 467 A.2d 136 (1983), does not preclude raising the issue again by way of a § 23-110 motion to vacate or correct sentence. *Kirk v. United States*, App. D.C., 510 A.2d 499 (1986).

Testimony of only one eyewitness was sufficient to support an adjudication of guilt. In re B.E.W., App. D.C., 537 A.2d 206 (1988).

Jury instructions on third party consent. — Upon request, where the accused defends against a charge of unauthorized use of a motor vehicle by asserting the belief that a third party was empowered to allow him to use the vehicle, the trial judge should instruct the jury essentially in the manner requested by appellant. *Jackson v. United States*, App. D.C., 600 A.2d 90 (1991).

Evidence held sufficient. — Evidence was sufficient to support an adjudication of the offense of unauthorized use of a motor vehicle. In re C.A.P., App. D.C., 633 A.2d 787 (1993).

Former § 22-2204 cited in *United States v. Nicks*, App. D.C., 427 A.2d 444 (1981); *Austin v. United States*, App. D.C., 433 A.2d 1081 (1981); *Thomas v. United States*, App. D.C., 447 A.2d 52 (1982); *Wesley v. United States*, App. D.C., 449 A.2d 282 (1982); *Sweet v. United States*, App. D.C., 449 A.2d 315 (1982); *Holt v. United States*, App. D.C., 486 A.2d 705 (1985).

Cited in *Douglas v. United States*, App. D.C., 488 A.2d 121 (1985); *Carter v. United States*, App. D.C., 531 A.2d 956 (1987); *Easton v. United States*, App. D.C., 533 A.2d 904 (1987); *Jefferson v. United States*, App. D.C., 587 A.2d 1075 (1991); *Smith v. United States*, App. D.C., 597 A.2d 377 (1991); *Hunter v. United States*, App. D.C., 606 A.2d 139, cert. denied, 506 U.S. 991, 113 S. Ct. 509, 121 L. Ed. 2d 444 (1992); *Byrd v. United States*, App. D.C., 618 A.2d 596 (1992); *Coleman v. United States*, App. D.C., 619 A.2d 40 (1993); *Young v. United States*, App. D.C., 639 A.2d 92 (1994); *Ulmer v. United States*, App. D.C., 649 A.2d 295 (1994); *Allen v. United States*, App. D.C., 649 A.2d 548 (1994).

§ 22-3816. Taking property without right.

A person commits the offense of taking property without right if that person takes and carries away the property of another without right to do so. A person convicted of taking property without right shall be fined not more than \$300 or

imprisoned for not more than 90 days, or both. (Dec. 1, 1982, D.C. Law 4-164, § 116, 29 DCR 3976.)

Legislative history of Law 4-164. — See note to § 22-3801.

Elements of offense. — To find defendant guilty of attempted taking property without right under this section and § 22-103, the finder of fact must have found, beyond a reasonable doubt, that she attempted to 1) take and 2) carry away 3) the property of another 4) without the right to do so. *Wormsley v. United States*, App. D.C., 526 A.2d 1373 (1987).

Knowledge that property is that of another. — Judgment was set aside where there was a lack of evidence proving that defendant knowingly took the property of another person — an essential element of the offense. *Schafer v. United States*, App. D.C., 656 A.2d 1185 (1995).

This section does not require proof that defendant took property from possession of complainant. *Tibbs v. United States*, App. D.C., 507 A.2d 141 (1986).

Takes and carries away. — Electricity may be taken and carried away within the meaning of this section. *United States v. Gray*, 115 WLR 265 (Super. Ct. 1987).

Criminal jury instruction No. 4.68 expressly disapproved. — Criminal jury instructions for the District of Columbia, No. 4.68 (3rd edition 1978), which lists as the first element of the offense of taking property without right “that the defendant took property from the possession of the claimant . . .,” which has never been approved by the Court of Appeals, is hereby expressly disapproved. *Tibbs v. United States*, App. D.C., 507 A.2d 141 (1986).

Instruction improperly denied in robbery prosecution. — Where there was an

evidentiary basis for an instruction on the lesser included offense of taking property without right, the court erred in denying defense counsel’s request for such an instruction, and defendant’s robbery conviction was therefore reversed. *Simmons v. United States*, App. D.C., 554 A.2d 1167 (1989).

Burden of proof. — The government must prove beyond a reasonable doubt that the accused lacked authority from the rightful owner of the property. *Craig v. United States*, App. D.C., 490 A.2d 1173 (1985).

Evidence was sufficient to support conviction of attempt to take property without right. *Wormsley v. United States*, App. D.C., 526 A.2d 1373 (1987).

Evidence insufficient. — Where defendant broke into ex-girlfriend’s house and took items he had bought for their use, and there was no proof that the purchase was a gift, evidence was not sufficient to find defendant guilty of taking property without a right. *Schafer v. United States*, App. D.C., 656 A.2d 1185 (1995).

Cited in *United States v. Evans*, 112 WLR 1721 (Super. Ct. 1984); *Chavez v. United States*, App. D.C., 499 A.2d 813 (1985); *Fussell v. United States*, App. D.C., 505 A.2d 72 (1986); *Baggett v. United States*, App. D.C., 528 A.2d 444 (1987); *Jeffcoat v. United States*, App. D.C., 551 A.2d 1301 (1988); *Wilson v. United States*, App. D.C., 558 A.2d 1135 (1989); *Dorm v. United States*, App. D.C., 559 A.2d 1317 (1989); *Arlt v. United States*, App. D.C., 562 A.2d 633 (1989); *White v. United States*, App. D.C., 564 A.2d 379 (1989); *Harris v. United States*, App. D.C., 602 A.2d 1140 (1992); *Applewhite v. United States*, App. D.C., 614 A.2d 888 (1992).

Subchapter III. Fraud; Related Offenses.

§ 22-3821. Fraud.

(a) *Fraud in the first degree.* — A person commits the offense of fraud in the first degree if that person engages in a scheme or systematic course of conduct with intent to defraud or to obtain property of another by means of a false or fraudulent pretense, representation, or promise and thereby obtains property of another or causes another to lose property.

(b) *Fraud in the second degree.* — A person commits the offense of fraud in the second degree if that person engages in a scheme or systematic course of conduct with intent to defraud or to obtain property of another by means of a false or fraudulent pretense, representation, or promise.

(c) *False promise as to future performance.* — Fraud may be committed by means of false promise as to future performance which the accused does not intend to perform or knows will not be performed. An intent or knowledge shall

not be established by the fact alone that one such promise was not performed. (Dec. 1, 1982, D.C. Law 4-164, § 121, 29 DCR 3976.)

Cross references. — As to penalties for violation of Medicaid Provider Fraud Prevention Act, see § 3-702.

As to prohibition of consecutive sentences for fraud and certain other crimes, see § 22-3803.

As to theft, see § 22-3811.

As to forgery, see § 22-3841.

As to enhanced penalty for crimes committed against senior citizen victims, see § 22-3901.

Section references. — This section is referred to in §§ 3-441 and 22-3802.

Legislative history of Law 4-164. — See note to § 22-3801.

Elements of false pretenses. — To convict a defendant for the crime of false pretenses, the government must prove that the defendant made a false representation with knowledge of its falsity and an intent to defraud; that the defrauded party relied on the misrepresentation; and that the defendant obtained (title to) something of value as a result of the misrepresentation. *Blackledge v. United States*, App. D.C., 447 A.2d 46 (1982).

False pretense or representation must relate to existing or past fact and a false promise to produce a future result does not constitute a false representation. *Blackledge v. United States*, App. D.C., 447 A.2d 46 (1982).

False representation may be oral or written, or it may be implied from conduct. *Blackledge v. United States*, App. D.C., 447 A.2d 46 (1982).

Presentation of check is implied representation of its validity. *Stepney v. United States*, App. D.C., 443 A.2d 555 (1982).

Unauthorized use of credit card could be violation of former § 22-1301. — Where a false pretenses charge stems from the unauthorized use of a credit card, it is not necessarily significant that the credit card was presented immediately after rather than just prior to receipt of the goods in what is virtually a simultaneous exchange. *Blackledge v. United States*, App. D.C., 447 A.2d 46 (1982).

An initial implicit false promise of lawful payment coupled with the presentation of a stolen credit card, which occur in a single and continuous transaction, can support a conviction for false pretenses or attempted false pretenses, provided that together they induce or would have induced the victim to surrender title to the property. *Blackledge v. United States*, App. D.C., 447 A.2d 46 (1982).

Proof of intent in prosecution for attempted false pretenses. — In a prosecution for attempted false pretenses, it is not necessary in order to establish an intent that the potential victim was deceived and had parted with something of value. *Blackledge v. United States*, App. D.C., 447 A.2d 46 (1982).

Former § 22-1301 cited in *United States v. Coats*, 652 F.2d 1002 (D.C. Cir. 1981); *United States v. Gambler*, 662 F.2d 834 (D.C. Cir. 1981).

Cited in *In re McBride*, App. D.C., 602 A.2d 626 (1992); *United States v. Lloyd*, 71 F.3d 408 (D.C. Cir. 1995).

§ 22-3822. Penalties for fraud.

(a) *Fraud in the first degree.* — (1) Any person convicted of fraud in the first degree shall be fined not more than \$5,000 or 3 times the value of the property obtained or lost, whichever is greater, or imprisoned for not more than 10 years, or both, if the value of the property obtained or lost is \$250 or more; and

(2) Any person convicted of fraud in the first degree shall be fined not more than \$1,000 or imprisoned for not more than 180 days, or both, if the value of the property obtained or lost was less than \$250.

(b) *Fraud in the second degree.* — (1) Any person convicted of fraud in the second degree shall be fined not more than \$3,000 or 3 times the value of the property which was the object of the scheme or systematic course of conduct, whichever is greater, or imprisoned for not more than 3 years, or both, if the value of the property which was the object of the scheme or systematic course of conduct was \$250 or more; and

(2) Any person convicted of fraud in the second degree shall be fined not more than \$1,000 or imprisoned for not more than 180 days, or both, if the value of the property which was the object of the scheme or systematic course

of conduct was less than \$250. (Dec. 1, 1982, D.C. Law 4-164, § 122, 29 DCR 3976; Aug. 20, 1994, D.C. Law 10-151, § 113(c), 41 DCR 2608.)

Cross references. — As to aggregation of theft, fraud, and credit card fraud offenses, see § 22-3802.

Effect of amendments. — D.C. Law 10-151 substituted “180 days” for “1 year” in (a)(2) and (b)(2).

Emergency act amendments. — For temporary amendment of section, see § 113(c) of the Omnibus Criminal Justice Reform Emer-

gency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 4-164. — See note to § 22-3801.

Legislative history of Law 10-151. — See note to § 22-3812.

Cited in United States v. Lloyd, 71 F.3d 408 (D.C. Cir. 1995).

§ 22-3823. Credit card fraud.

(a) For the purpose of this section, the term “credit card” means an instrument or device, whether known as a credit card plate, debit card, or by any other name, issued by a person for use of the cardholder in obtaining property or services.

(b) A person commits the offense of credit card fraud if, with intent to defraud, that person obtains property of another by:

(1) Knowingly using a credit card, or the number or description thereof, which has been issued to another person without the consent of the person to whom it was issued;

(2) Knowingly using a credit card, or the number or description thereof, which has been revoked or cancelled;

(3) Knowingly using a falsified, mutilated, or altered credit card or number or description thereof; or

(4) Representing that he or she is the holder of a credit card and the credit card had not in fact been issued.

(c) A credit card is deemed cancelled or revoked when notice in writing thereof has been received by the named holder as shown on the credit card or by the records of the issuer.

(d)(1) Any person convicted of credit card fraud shall be fined not more than \$5,000 or imprisoned for not more than 10 years, or both, if the value of the property obtained is \$250 or more.

(2) Any person convicted of credit card fraud shall be fined not more than \$1,000 or imprisoned for not more than 180 days, or both, if the value of the property obtained is less than \$250. (Dec. 1, 1982, D.C. Law 4-164, § 123, 29 DCR 3976; Aug. 20, 1994, D.C. Law 10-151, § 113(d), 41 DCR 2608.)

Cross references. — As to aggregation of theft, fraud, and credit card fraud offenses, see § 22-3802.

As to forgery, see § 22-3841.

Section references. — This section is referred to in § 22-3802.

Effect of amendments. — D.C. Law 10-151 substituted “180 days” for “1 year” in (d)(2).

Emergency act amendments. — For tem-

porary amendment of section, see § 113(d) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 4-164. — See note to § 22-3801.

Legislative history of Law 10-151. — See note to § 22-3812.

§ 22-3824. **Fraudulent registration.**

(a) A person commits the offense of fraudulent registration if, with intent to defraud the proprietor or manager of a hotel, motel, or other establishment which provides lodging to transient guests, that person falsely registers under a name or address other than his or her actual name or address.

(b) Any person convicted of fraudulent registration shall be fined not more than \$300 or imprisoned for not more than 90 days, or both. (Dec. 1, 1982, D.C. 4-164, § 124, 29 DCR 3976.)

Cross references. — As to rights and liabilities of hotel and lodging housekeepers, see §§ 34-101 to 34-103.

Legislative history of Law 4-164. — See note to § 22-3801.

Subchapter IV. Stolen Property.

§ 22-3831. **Trafficking in stolen property.**

(a) For the purposes of this section, the term “traffics” means:

(1) To sell, pledge, transfer, distribute, dispense, or otherwise dispose of property to another person as consideration for anything of value; or

(2) To buy, receive, possess, or obtain control of property with intent to do any of the acts set forth in paragraph (1) of this subsection.

(b) A person commits the offense of trafficking in stolen property if, on 2 or more separate occasions, that person traffics in stolen property, knowing or having reason to believe that the property has been stolen.

(c) It shall not be a defense to a prosecution under this section that the property was not in fact stolen, if the accused engages in conduct which would constitute the crime if the attendant circumstances were as the accused believed them to be.

(d) Any person convicted of trafficking in stolen property shall be fined not more than \$10,000 or imprisoned for not more than 10 years, or both. (Dec. 1, 1982, D.C. Law 4-164, § 131, 29 DCR 3976.)

Legislative history of Law 4-164. — See note to § 22-3801.

This section is not void, illegal and unconstitutional because the Secretary of the Council of the District of Columbia did not accurately “verify,” or attach a signature, to the documentation of the vote count at required readings of the bill, and also did not verify the reading at all until the final reading. *German v. United States*, App. D.C., 525 A.2d 596, cert. denied, 484 U.S. 944, 108 S. Ct. 331, 98 L. Ed. 2d 358 (1987).

Due process. — A substantive due process challenge to subsection (c) as arbitrary and capricious readily fails because the statute is rationally related to a legitimate governmental interest, and the legislative history reveals that

the District of Columbia Council acted in a rational fashion to alleviate the problems associated with curbing fencing operations. *German v. United States*, App. D.C., 525 A.2d 596, cert. denied, 484 U.S. 944, 108 S. Ct. 331, 98 L. Ed. 2d 358 (1987).

Elements of offense. — The actual status of the stolen property does little, if anything, to increase the uncertainty facing a prospective purchaser. The key element of the crime is “reason to know” that the goods are stolen. *German v. United States*, App. D.C., 525 A.2d 596, cert. denied, 484 U.S. 944, 108 S. Ct. 331, 98 L. Ed. 2d 358 (1987).

Cited in *DiGiovanni v. United States*, App. D.C., 580 A.2d 123 (1990); *Byrd v. United States*, App. D.C., 618 A.2d 596 (1992).

§ 22-3832. Receiving stolen property.

(a) A person commits the offense of receiving stolen property if that person buys, receives, possesses, or obtains control of stolen property, knowing or having reason to believe that the property was stolen, with intent to deprive another of the right to the property or a benefit of the property.

(b) It shall not be a defense to a prosecution for an attempt to commit the offense described in this section that the property was not in fact stolen, if the accused engages in conduct which would constitute the crime if the attendant circumstances were as the accused believed them to be.

(c)(1) Any person convicted of receiving stolen property shall be fined not more than \$5,000 or imprisoned not more than 7 years, or both, if the value of the stolen property is \$250 or more.

(2) Any person convicted of receiving stolen property shall be fined not more than \$1,000 or imprisoned not more than 180 days, or both, if the value of the stolen property is less than \$250. (Dec. 1, 1982, D.C. Law 4-164, § 132, 29 DCR 3976; Aug. 20, 1994, D.C. Law 10-151, § 113(f), 41 DCR 2608.)

Effect of amendments. — D.C. Law 10-151 substituted “180 days” for “1 year” in (c)(2).

Emergency act amendments. — For temporary amendment of section, see § 113(f) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 4-164. — See note to § 22-3801.

Legislative history of Law 10-151. — See note to § 22-3812.

Necessary elements of offense under former § 22-2205. — The offense of receiving stolen property as set forth in former § 22-2205 was composed essentially of 4 elements: (1) The property must have been received; (2) at the time of its receipt, the property must have been stolen; (3) the receiver must have had guilty knowledge that it was stolen property; and (4) his intent in receiving it must have been fraudulent. In re P.A.S., App. D.C., 434 A.2d 461 (1981).

In prosecutions for receiving stolen property under former § 22-2205, the government was required to prove that a stolen item of value was received by the defendant with an intent to defraud and while the defendant knew or had reason to know that the item was stolen. Blackledge v. United States, App. D.C., 447 A.2d 46 (1982).

Proof of value under former § 22-2205. — The government, under former § 22-2205, was required to show that the stolen property had some real value to the owner. In re P.A.S., App. D.C., 434 A.2d 461 (1981); Blackledge v. United States, App. D.C., 447 A.2d 46 (1982).

Although value was an essential element of the misdemeanor crime of receiving stolen property under former § 22-2205, no specific

minimum value was required to be established. Blackledge v. United States, App. D.C., 447 A.2d 46 (1982).

A currently usable credit card is of obvious monetary value. Blackledge v. United States, App. D.C., 447 A.2d 46 (1982).

Merger of offenses. — Conviction for unauthorized use of a vehicle merges with the offense of receiving stolen property. Alston v. United States, App. D.C., 552 A.2d 526 (1989).

Section 22-3803 does not prohibit convictions for both receiving stolen property and unauthorized use of a vehicle, but only the imposition of consecutive sentences. Byrd v. United States, App. D.C., 598 A.2d 386 (1991).

Value of stolen property. — A jury could reasonably find that the fair market value of a nearly new four door sedan, fully operable and in good condition as evidenced by the photographs, exceeded \$250 at the time of the offense. Curtis v. United States, App. D.C., 611 A.2d 51 (1992).

Inference from evidence of possession of recently stolen property. — A jury reasonably may infer the requisite state of mind for the offense of receiving stolen property where evidence reveals defendant’s unexplained (or unsatisfactorily explained) possession of recently stolen property. Blackledge v. United States, App. D.C., 447 A.2d 46 (1982).

Conviction of principal for receiving stolen property held not prerequisite to aiding and abetting conviction. — See United States v. Richardson, 817 F.2d 886 (D.C. Cir. 1987).

Admissibility of evidence. — Where defendant was convicted of receiving stolen property and unauthorized use of a vehicle, a statement obtained after he invoked his right to

remain silent could only be admitted if legally obtained, and the trial court should have conducted a voir dire to determine whether the statement was obtained legally. *Jackson v. United States*, App. D.C., 589 A.2d 1270 (1991).

Sufficiency of evidence. — Evidence can be sufficient for a reasonable jury to infer that a defendant knew he had possession of a motor vehicle under circumstances which indicated that he had not acquired possession with the consent of the true owner, and support a conviction for unauthorized use of a motor vehicle; yet based on the same evidence, it may be impermissible speculation or conjecture on the part of a jury to infer the defendant had the specific intent to deprive the owner permanently of his property, to sustain his conviction for receiving stolen property. *United States v. Brown*, 120 WLR 697 (Super. Ct. 1992).

Sufficient evidence to convict. — See *Curtis v. United States*, App. D.C., 611 A.2d 51 (1992).

Instructions regarding intent. — To properly instruct the jury on the intent required for conviction of receiving stolen property, a trial

judge may either use the appropriate standard jury instruction on specific intent or, where the statute itself sets out the specific intent, he may substitute the statutory language. *DiGiovanni v. United States*, App. D.C., 580 A.2d 123 (1990).

The trial judge need not specifically instruct the jury that an element of the offense of receiving stolen property under this section is intent to defraud. *DiGiovanni v. United States*, App. D.C., 580 A.2d 123 (1990).

Former § 22-2205 cited in *United States v. Stancil*, App. D.C., 422 A.2d 1285 (1980); *United States v. Nicks*, App. D.C., 427 A.2d 444 (1981); *Martin v. United States*, App. D.C., 435 A.2d 395 (1981).

Former § 22-2207 cited in *Mulky v. United States*, App. D.C., 451 A.2d 855 (1982).

Cited in *Morris v. United States*, App. D.C., 548 A.2d 1383 (1988); *Morrison v. United States*, App. D.C., 547 A.2d 996 (1988); *United States v. Recognition Equip., Inc.*, 725 F. Supp. 587 (D.D.C. 1989); *McFadden v. United States*, App. D.C., 614 A.2d 11 (1992); *Ulmer v. United States*, App. D.C., 649 A.2d 295 (1994).

Subchapter V. Forgery.

§ 22-3841. Forgery.

(a) For the purposes of this subchapter, the term:

(1) "Forged written instrument" means any written instrument that purports to be genuine but which is not because it:

(A) Has been falsely made, altered, signed, or endorsed;

(B) Contains a false addition or insertion; or

(C) Is a combination of parts of 2 or more genuine written instruments.

(2) "Utter" means to issue, authenticate, transfer, publish, sell, deliver, transmit, present, display, use, or certify.

(3) "Written instrument" includes, but is not limited to, any:

(A) Security, bill of lading, document of title, draft, check, certificate of deposit, and letter of credit, as defined in Title 28;

(B) Stamp, legal tender, or other obligation of any domestic or foreign governmental entity;

(C) Stock certificate, money order, money order blank, traveler's check, evidence of indebtedness, certificate of interest or participation in any profitsharing agreement, transferable share, investment contract, voting trust certificate, certification of interest in any tangible or intangible property, and any certificate or receipt for or warrant or right to subscribe to or purchase any of the foregoing items;

(D) Commercial paper or document, or any other commercial instrument containing written or printed matter or the equivalent; or

(E) Other instrument commonly known as a security or so defined by an Act of Congress or a provision of the District of Columbia Code.

(b) A person commits the offense of forgery if that person makes, draws, or utters a forged written instrument with intent to defraud or injure another. (Dec. 1, 1982, D.C. Law 4-164, § 141, 29 DCR 3976.)

Cross references. — As to fraud, see § 22-3821.

As to credit card fraud, see § 22-3823.

Section references. — This section is referred to in § 16-4901.

Legislative history of Law 4-164. — See note to § 22-3801.

Common law superseded. — The enactment of this section did not mark a return to the common law elements of forgery; therefore, jury's verdict was found to be consistent with the proof required under the section. *Driver v. United States*, App. D.C., 521 A.2d 254 (1987).

Written instrument. — The language and legislative history of this section make clear that the definition of "written instrument" is to have a broad construction; it is not to be restricted to the instruments enumerated in subsection (a)(3). All written instruments that might operate to the prejudice of another are covered by the statutory definition. *Gholson v. United States*, App. D.C., 532 A.2d 118 (1987).

Time slips which report work performed fall within the definition of "written instrument." *Gholson v. United States*, App. D.C., 532 A.2d 118 (1987).

Elements of making false instrument are: There must be a false making or other alteration of some instrument in writing; there must be a fraudulent intent; and the instrument must be apparently capable of effecting a fraud. *Martin v. United States*, App. D.C., 435 A.2d 395 (1981).

Unauthorized completion of instruments renders them forged. — It is the unauthorized completion of stolen money or-

ders which renders the instruments "falsely made or altered." Absent the true owner's authority to complete the blank money orders, the insertion by another of any information onto those orders is a false making or alteration of the documents. *Martin v. United States*, App. D.C., 435 A.2d 395 (1981).

Use of fictitious names. — The forgery statute has been interpreted to reach the signing of a fictitious name, accompanied by the necessary fraudulent intent, to an instrument capable of working a prejudice to the interest of another. *United States v. Sayan*, 968 F.2d 55 (D.C. Cir. 1992).

False signatures or endorsements on checks and drafts defendant deposited were not immaterial to the drawer bank where, if defendant had merely made the drafts payable to herself, the bank would not have granted her immediate credit; however, by creating fictitious payees and forging endorsements, she was able to convince the bank to accept her deposits. *United States v. Sayan*, 968 F.2d 55 (D.C. Cir. 1992).

Former § 22-1401 cited in *White v. United States*, App. D.C., 425 A.2d 616 (1980); *United States v. Coats*, 652 F.2d 1002 (D.C. Cir. 1981); *Stepney v. United States*, App. D.C., 443 A.2d 555 (1982).

Cited in *Fussell v. United States*, App. D.C., 505 A.2d 72 (1986); *United States v. Rhodes*, 886 F.2d 375 (D.C. Cir. 1989); *United States v. Miller*, 895 F.2d 1431 (D.C. Cir.), cert. denied, 498 U.S. 825, 111 S. Ct. 79, 112 L. Ed. 2d 52 (1990); *In re Schwartz*, App. D.C., 619 A.2d 39 (1993).

§ 22-3842. Penalties for forgery.

(a) Any person convicted of forgery shall be fined not more than \$10,000 or imprisoned for not more than 10 years, or both, if the written instrument purports to be:

(1) A stamp, legal tender, bond, check, or other valuable instrument issued by a domestic or foreign government or governmental instrumentality;

(2) A stock certificate, bond, or other instrument representing an interest in or claim against a corporation or other organization of its property;

(3) A public record, or instrument filed in a public office or with a public servant;

(4) A written instrument officially issued or created by a public office, public servant, or government instrumentality;

(5) A check which upon its face appears to be a payroll check;

(6) A deed, will, codicil, contract, assignment, commercial instrument, or other instrument which does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status; or

(7) A written instrument having a value of \$10,000 or more.

(b) Any person convicted of forgery shall be fined not more than \$5,000 or imprisoned for not more than 5 years, or both, if the written instrument is or purports to be:

(1) A token, fare card, public transportation transfer certificate, or other article manufactured for use as a symbol of value in place of money for the purchase of property or services;

(2) A prescription of a duly licensed physician or other person authorized to issue the same for any controlled substance or other instrument or devices used in the taking or administering of controlled substances for which a prescription is required by law; or

(3) A written instrument having a value of \$250 or more.

(c) Any person convicted of forgery shall be fined not more than \$2,500 or imprisoned for not more than 3 years, or both, in any other case. (Dec. 1, 1982, D.C. Law 4-164, § 142, 29 DCR 3976.)

Section references. — This section is referred to in § 16-4901.

Legislative history of Law 4-164. — See note to § 22-3801.

Allegation of value. — Where indictment for forgery and uttering did not say in so many words that the value of the money order defendant forged and uttered was of a value of \$250 or more but the indictment's forgery count contained a photocopy of the actual money order at issue in the case, and the uttering count made reference to the copy and incorporated it by reference, the photocopy was sufficient in the context of the case to provide the necessary allegation of value. *Driver v. United States*, App. D.C., 521 A.2d 254 (1987).

Where trial court failed to make any mention of the need for the jury to make a finding that each of the allegedly forged or uttered checks was or purported to be of a value of \$250 or more, because the omission was first raised at the appellate level as an asserted ground of reversible error, the omission was not cause for reversal, since the relevant facts were so closely related that no rational jury, shown by its verdict to have found, the facts necessary to convict the defendant under the instructions as given, could have failed, if fully instructed on each element, to have found, in addition, the facts necessary to comprise the omitted element. *White v. United States*, App. D.C., 613 A.2d 869 (1992).

Use of fictitious names. — The forgery statute has been interpreted to reach the sign-

ing of a fictitious name, accompanied by the necessary fraudulent intent, to an instrument capable of working a prejudice to the interest of another. *United States v. Sayan*, 968 F.2d 55 (D.C. Cir. 1992).

False signatures or endorsements on checks and drafts defendant deposited were not immaterial to the drawer bank where, if defendant had merely made the drafts payable to herself, the bank would not have granted her immediate credit; however, by creating fictitious payees and forging endorsements, she was able to convince the bank to accept her deposits. *United States v. Sayan*, 968 F.2d 55 (D.C. Cir. 1992).

Sentence under subsection (a) improper. — Where the written instrument involved in forgery and uttering conviction was of a value of more than \$250 but less than \$10,000, concurrent sentences under subsection (a) of this section were improper and defendant must be resentenced in accordance with subsection (b) of this section. *Driver v. United States*, App. D.C., 521 A.2d 254 (1987).

Cited in *Fussell v. United States*, App. D.C., 505 A.2d 72 (1986); *Gholson v. United States*, App. D.C., 532 A.2d 118 (1987); *United States v. Miller*, 895 F.2d 1431 (D.C. Cir.), cert. denied, 498 U.S. 825, 111 S. Ct. 79, 112 L. Ed. 2d 52 (1990); *Johnson v. United States*, App. D.C., 613 A.2d 1381 (1992); *In re Schwartz*, App. D.C., 619 A.2d 39 (1993).

*Subchapter VI. Extortion.***§ 22-3851. Extortion.**

(a) A person commits the offense of extortion if:

(1) That person obtains or attempts to obtain the property of another with the other's consent which was induced by wrongful use of actual or threatened force or violence or by wrongful threat of economic injury; or

(2) That person obtains or attempts to obtain property of another with the other's consent which was obtained under color or pretense of official right.

(b) Any person convicted of extortion shall be fined not more than \$10,000 or imprisoned for not more than 10 years, or both. (Dec. 1, 1982, D.C. Law 4-164, § 151, 29 DCR 3976.)

Cross references. — As to enhanced penalty for crimes committed against senior citizen victims, see § 22-3901.

Legislative history of Law 4-164. — See note to § 22-3801.

Origin of threat out of District. — If a transmitted communication for ransom or kidnap reward is received by someone in the District of Columbia, the transmitter is within the proscriptive ambit of this section regardless of from where the communication originates. *Battle v. United States*, App. D.C., 515 A.2d 1120 (1986).

Evidence sufficient for claim of extor-

tion. — Plaintiffs made out a claim for extortion, where they showed defendants have threatened them with information gained from wiretapping, to deprive them of their property, including attempts to keep them from selling their business, thus depriving them of cash, and attempts to eliminate plaintiffs' interest in their business. *Federal Information Sys., Corp. v. Boyd*, 753 F. Supp. 971 (D.D.C. 1990).

Former § 22-2306 cited in *Ball v. United States*, App. D.C., 429 A.2d 1353 (1981).

Cited in *Holt v. United States*, App. D.C., 565 A.2d 970 (1989).

§ 22-3852. Blackmail.

(a) A person commits the offense of blackmail, if, with intent to obtain property of another or to cause another to do or refrain from doing any act, that person threatens:

(1) To accuse any person of a crime;

(2) To expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule; or

(3) To impair the reputation of any person, including a deceased person.

(b) Any person convicted of blackmail shall be fined not more than \$1,000 or imprisoned for not more than 5 years, or both. (Dec. 1, 1982, D.C. Law 4-164, § 152, 29 DCR 3976.)

Legislative history of Law 4-164. — See note to § 22-3801.

Cited in *Holt v. United States*, App. D.C., 565 A.2d 970 (1989).

CHAPTER 39. CRIMES COMMITTED AGAINST SENIOR CITIZEN VICTIMS.

Sec.

22-3901. Enhanced penalty.

22-3902. Enhanced penalty for committing cer-

tain dangerous and violent crimes
against a citizen patrol member.

§ 22-3901. Enhanced penalty.

(a) Any person who commits any offense listed in subsection (b) of this section against an individual who is 60 years of age or older, at the time of the offense, may be punished by a fine of up to 1½ times the maximum fine otherwise authorized for the offense and may be imprisoned for a term of up to 1½ times the maximum term of imprisonment otherwise authorized for the offense, or both.

(b) The provisions of subsection (a) of this section shall apply to the following offenses: Robbery, attempted robbery, theft, attempted theft, extortion, fraud in the first degree, and fraud in the second degree.

(c) It is an affirmative defense that the accused knew or reasonably believed that the victim was not 60 years of age or older at the time of the offense. (Dec. 1, 1982, D.C. Law 4-164, § 201, 29 DCR 3976.)

Cross references. — As to robbery, see § 22-2901.

As to attempt to commit robbery, see § 22-2902.

As to theft, see § 22-3811.

As to fraud, see § 22-3821.

As to extortion, see § 22-3851.

Legislative history of Law 4-164. — Law 4-164, the "District of Columbia Theft and White Collar Crimes Act of 1982," was introduced in Council and assigned Bill No. 4-133, which was referred to the Committee on the Judiciary. The Bill was adopted on first, amended first and second readings on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.

Discretion of court. — It is within the discretion of the trial court to apply or ignore the enhancement provision when sentencing despite the fact that the additional burden had been met by the government. *Driver v. United States*, App. D.C., 521 A.2d 254 (1987).

Elements. — The age of the victim under this section is an element of the offense which must be alleged in the indictment and is thus a matter for proof at trial. *Fields v. United States*, App. D.C., 547 A.2d 138 (1988).

Affirmative defense. — The statutory language and the legislative history of this section uniformly reflect a clear intent to provide an affirmative defense to the enhanced penalty and not to provide a defense to the charged offense. *Fields v. United States*, App. D.C., 547 A.2d 138 (1988).

This section does not contain an unconstitution-
al presumption, and a defendant is not deprived of due process of law because the statute requires him to assert and prove his reasonable belief that the victim was less than sixty years of age. *Fields v. United States*, App. D.C., 547 A.2d 138 (1988).

Cited in *Ramos v. District of Columbia Dep't of Consumer & Regulatory Affairs*, App. D.C., 601 A.2d 1069 (1992); *Outlaw v. United States*, App. D.C., 604 A.2d 873 (1992); *Coleman v. United States*, App. D.C., 619 A.2d 40 (1993).

§ 22-3902. Enhanced penalty for committing certain dangerous and violent crimes against a citizen patrol member.

(a) For purposes of this section, the term "citizen patrol" means a group of residents of the District of Columbia organized for the purpose of providing additional security surveillance for certain District of Columbia neighborhoods with the goal of crime prevention. The term shall include, but is not limited to,

Orange Hat Patrols, Red Hat Patrols, Blue Hat Patrols, or Neighborhood Watch Associations.

(b) Any person who commits any offense listed in subsection (c) of this section against a member of a citizen patrol ("member") while that member is participating in a citizen patrol, or because of the member's participation in a citizen patrol, may be punished with a fine up to 1 ½ times the maximum fine otherwise authorized for the offense or may be imprisoned for a term of up to 1 ½ times the maximum term of imprisonment otherwise authorized for this offense, or both.

(c) The provisions of subsection (b) of this section shall apply to the following offenses: taking or attempting to take property from another by force or threat of force, forcible rape, or assault with intent to commit forcible rape, murder, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, assault with a deadly weapon, simple assault, aggravated assault, or a conspiracy to commit any of the foregoing offenses as defined by an Act of Congress or law of the District of Columbia if the offense is punishable by imprisonment for more than 1 year. (Dec. 1, 1982, D.C. Law 4-164, § 202, as added Aug. 20, 1994, D.C. Law 10-151, § 401, 41 DCR 2608.)

Effect of amendments. — D.C. Law 10-151 added this section.

Emergency act amendments. — For temporary addition of section, see § 401 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — Law 10-151, the "Omnibus Criminal Justice Reform Amendment Act of 1994," was introduced in

Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

CHAPTER 40. BIAS-RELATED CRIME.

Sec.

22-4001. Definitions.

22-4002. Collection and publication of data.

Sec.

22-4003. Bias-related crime.

22-4004. Civil action.

§ 22-4001. Definitions.

For the purposes of this chapter, the term:

(1) "Bias-related crime" means a designated act that demonstrates an accused's prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibility, physical handicap, matriculation, or political affiliation of a victim of the subject designated act.

(2) "Designated act" means a criminal act, including arson, assault, burglary, injury to property, kidnapping, manslaughter, murder, rape, robbery, theft, or unlawful entry, and attempting, aiding, abetting, advising, inciting, conniving, or conspiring to commit arson, assault, burglary, injury to property, kidnapping, manslaughter, murder, rape, robbery, theft, or unlawful entry. (May 8, 1990, D.C. Law 8-121, § 2, 37 DCR 27.)

Legislative history of Law 8-121. — Law 8-121, the "Bias-Related Crime Act of 1989," was introduced in Council and assigned Bill No. 8-168, which was referred to the Committee on the Judiciary. The Bill was adopted on first

and second readings on November 21, 1989, and December 5, 1989, respectively. Signed by the Mayor on December 21, 1989, it was assigned Act No. 8-130 and transmitted to both Houses of Congress for its review.

§ 22-4002. Collection and publication of data.

(a) The Metropolitan Police force shall afford each crime victim the opportunity to submit with the complaint a written statement that contains information to support a claim that the designated act constitutes a bias-related crime.

(b) The Mayor shall collect and compile data on the incidence of bias-related crime.

(c) Data collected under subsection (b) of this section shall be used for research or statistical purposes and may not contain information that may reveal the identity of an individual crime victim.

(d) The Mayor shall publish an annual summary of the data collected under subsection (b) of this section and transmit the summary and recommendations based on the summary to the Council. (May 8, 1990, D.C. Law 8-121, § 3, 37 DCR 27.)

Legislative history of Law 8-121. — See note to § 22-4001.

§ 22-4003. Bias-related crime.

A person charged with and found guilty of a bias-related crime shall be fined not more than 1½ times the maximum fine authorized for the designated act

and imprisoned for not more than 1½ times the maximum term authorized for the designated act. (May 8, 1990, D.C. Law 8-121, § 4, 37 DCR 27.)

Legislative history of Law 8-121. — See note to § 22-4001.

§ 22-4004. Civil action.

(a) Irrespective of any criminal prosecution or the result of a criminal prosecution, any person who incurs injury to his or her person or property as a result of an intentional act that demonstrates an accused's prejudice based on the actual or perceived race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, or political affiliation of a victim of the subject designated act shall have a civil cause of action in a court of competent jurisdiction for appropriate relief, which includes:

- (1) An injunction;
- (2) Actual or nominal damages for economic or non-economic loss, including damages for emotional distress;
- (3) Punitive damages in an amount to be determined by a jury or a court sitting without a jury; or
- (4) Reasonable attorneys' fees and costs.

(b) In a civil action pursuant to subsection (a) of this section, whether an intentional act has occurred that demonstrates an accused's prejudice based on the actual or perceived color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, or political affiliation of a victim of the subject designated act shall be determined by reliable, probative, and substantial evidence.

(c) The parent of a minor shall be liable for any damages that a minor is required to pay under subsection (a) of this section, if any action or omission of the parent or legal guardian contributed to the actions of the minor. (May 8, 1990, D.C. Law 8-121, § 5, 37 DCR 27.)

Legislative history of Law 8-121. — See note to § 22-4001.

CHAPTER 41. SEXUAL ABUSE.

Subchapter I. General Provisions.

Sec.

22-4101. Definitions.

Subchapter II. Sex Offenses.

- 22-4102. First degree sexual abuse.
- 22-4103. Second degree sexual abuse.
- 22-4104. Third degree sexual abuse.
- 22-4105. Fourth degree sexual abuse.
- 22-4106. Misdemeanor sexual abuse.
- 22-4107. Defense to sexual abuse.
- 22-4108. First degree child sexual abuse.
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- 22-4110. Enticing a child.
- 22-4111. Defenses to child sexual abuse.
- 22-4112. State of mind proof requirement.
- 22-4113. First degree sexual abuse of a ward.
- 22-4114. Second degree sexual abuse of a ward.
- 22-4115. First degree sexual abuse of a patient or client.

Sec.

- 22-4116. Second degree sexual abuse of a patient or client.
- 22-4117. Defenses to sexual abuse of a ward, patient, or client.
- 22-4118. Attempts to commit sexual offenses.
- 22-4119. No spousal immunity from prosecution.
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Subchapter III. Admission of Evidence in Sexual Abuse Offense Cases.

- 22-4121. Reputation or opinion evidence of victim's past sexual behavior inadmissible.
- 22-4122. Admissibility of other evidence of victim's past sexual behavior.
- 22-4123. Prompt reporting.
- 22-4124. Spousal privilege inapplicable.

Subchapter I. General Provisions.

§ 22-4101. Definitions.

For the purposes of this chapter:

(1) "Actor" means a person accused of any offense proscribed under this chapter.

(2) "Bodily injury" means injury involving loss or impairment of the function of a bodily member, organ, or mental faculty, or physical disfigurement, disease, sickness, or injury involving significant pain.

(3) "Child" means a person who has not yet attained the age of 16 years.

(4) "Consent" means words or overt actions indicating a freely given agreement to the sexual act or contact in question. Lack of verbal or physical resistance or submission by the victim, resulting from the use of force, threats, or coercion by the defendant shall not constitute consent.

(5) "Force" means the use or threatened use of a weapon; the use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.

(6) "Official custody" means:

(A) Detention following arrest for an offense; following surrender in lieu of arrest for an offense; following a charge or conviction of an offense, or an allegation or finding of juvenile delinquency; following commitment as a material witness; following or pending civil commitment proceedings, or pending extradition, deportation, or exclusion;

(B) Custody for purposes incident to any detention described in subparagraph (A) of this paragraph, including transportation, medical diagnosis or treatment, court appearance, work, and recreation; or

(C) Probation or parole.

(7) "Serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

(8) "Sexual act" means:

(A) The penetration, however slight, of the anus or vulva of another by a penis;

(B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or

(C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph.

(9) "Sexual contact" means the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

(10) "Significant relationship" includes:

(A) A parent, sibling, aunt, uncle, or grandparent, whether related by blood, marriage, or adoption;

(B) A legal or de facto guardian or any person, more than 4 years older than the victim, who resides intermittently or permanently in the same dwelling as the victim;

(C) The person or the spouse or paramour of the person who is charged with any duty or responsibility for the health, welfare, or supervision of the victim at the time of the act; and

(D) A teacher, scout master, coach, recreation center leader, or others in similar positions.

(11) "Victim" means a person who is alleged to have been subject to any offense set forth in subchapter II of this chapter. (May 23, 1995, D.C. Law 10-257, § 101, 42 DCR 53.)

Legislative history of Law 10-257. — Law 10-257, the "Anti-Sexual Abuse Act of 1994," was introduced in Council and assigned Bill No. 10-87, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on November 1, 1994, and December 6, 1994, respectively. Signed by the Mayor on December 28, 1994, it was assigned Act No. 10-385 and transmitted to both Houses of Congress for its review. D.C. Law 10-257 became effective May 23, 1995.

Editor's notes. — D.C. Law 10-257, inter alia, repealed former chapter 28 of Title 22 regarding rape, former chapter 30 of Title 22 regarding seduction, § 22-3501 regarding indecent acts with children, and § 22-3502 regarding sodomy and enacted this chapter. The cases

appearing in the notes in this chapter were decided under the former statutes in effect prior to the 1995 repeals. These earlier cases have been moved to pertinent sections of this chapter where they may be useful in interpreting the current statutes. Internal references have also been updated.

Consent. — In a rape prosecution, "consent" is not shown where resistance is overcome by threats which put the woman in fear of death or grave bodily harm or by those combined with some degree of physical force. *Ewing v. United States*, 135 F.2d 633 (D.C. Cir. 1942), cert. denied, 318 U.S. 776, 63 S. Ct. 829, 87 L. Ed. 1145 (1943).

Where a child under the age of consent is involved, the law conclusively presumes the use

of force and the question of consent is immaterial. *United States v. Jones*, 477 F.2d 1213 (D.C. Cir. 1973).

Subchapter II. Sex Offenses.

§ 22-4102. First degree sexual abuse.

A person shall be imprisoned for any term of years or for life and in addition may be fined in an amount not to exceed \$250,000, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner:

- (1) By using force against that other person;
- (2) By threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping;
- (3) After rendering that other person unconscious; or
- (4) After administering to that other person by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or other similar substance that substantially impairs the ability of that other person to appraise or control his or her conduct. (May 23, 1995, D.C. Law 10-257, § 201, 42 DCR 53.)

Section references. — This section is referred to in §§ 22-4107 and 22-4110.

Legislative history of Law 10-257. — See note to § 22-4101.

Former section constitutional. — The protection from illicit sexual intercourse of underage females, in contradistinction to male children, provided by former similar provision was a reasonable classification and does not deny due process to males under the age of 16. *In re W.E.P.*, App. D.C., 318 A.2d 286 (1974).

Rape is noncapital offense subject to statute of limitations of 18 U.S.C. § 3282. *United States v. Brown*, App. D.C., 422 A.2d 1281 (1980).

Proscriptions against rape and carnal knowledge serve different purposes. — The prohibition against common law rape is to protect females capable of giving consent from forcible sexual intercourse, while the statutory proscription against carnal knowledge is intended to protect females below the age of 16, regardless of the use of force or consent, from any sexual relationship. *Ballard v. United States*, App. D.C., 430 A.2d 483 (1981).

The elements necessary to establish what has traditionally been known as the offense of common law rape are sexual intercourse with a female, committed forcibly and against her will. *Ballard v. United States*, App. D.C., 430 A.2d 483 (1981).

Assault with intent to rape is distinguished from rape. *Williams v. United States*, 131 F.2d 21 (D.C. Cir. 1942).

And lesser included offense. — Assault with intent to rape is a lesser offense included

in a charge of rape. *Johnson v. United States*, 350 F.2d 784 (D.C. Cir. 1965).

Armed assault as lesser included offense. — Where an armed assault is an essential part of the proof establishing armed rape, armed assault is a lesser included offense. *United States v. Edmonds*, 524 F.2d 62 (D.C. Cir. 1975).

Evidence sufficient to establish sexual assault. — The evidence in a prosecution for assault with intent to commit rape must be sufficient to establish that the defendant intended to achieve sexual intercourse by force and violence and against the will of the prosecutrix. *United States v. Tremble*, 470 F.2d 1272 (D.C. Cir. 1972).

Neither rape nor carnal knowledge is lesser included offense of incest. The elements of the offenses of rape and incest are not the same, and each requires proof of one or more elements that the other does not. Furthermore, since incest requires proof of a familial relationship that carnal knowledge does not, and carnal knowledge imposes an age requirement that incest does not, those two offenses do not merge. *Pounds v. United States*, App. D.C., 529 A.2d 791 (1987).

Assault with intent to commit sodomy is not lesser included offense of rape where perpetrated against a mature female. *Sweet v. United States*, App. D.C., 449 A.2d 315 (1982).

Merger of rape and kidnapping depends on facts of case. — Every person who commits a rape should not also be charged and convicted of kidnapping, with its generally more severe penal consequences; rather the facts of each

case must be examined to determine whether in fact 2 separate crimes were committed, or whether they merged. *Robinson v. United States*, App. D.C., 388 A.2d 1210 (1978).

In determining whether the separate crimes of rape and kidnapping should be merged, courts will inquire whether the asportation (or seizure) in a given case was of the type incidental to every rape or whether the confinement and restraint were significant enough of themselves to warrant an independent prosecution for kidnapping. *Robinson v. United States*, App. D.C., 388 A.2d 1210 (1978).

The detention, coercion, or confinement which is an integral part of every rape cannot support a separate conviction for kidnapping. *Smothers v. United States*, App. D.C., 403 A.2d 306 (1979).

Assault with a dangerous weapon conviction merged with armed rape. *Johnson v. United States*, App. D.C., 613 A.2d 888 (1992).

Underlying felony merges into felony murder conviction so that the convictions for the felonies of rape, robbery, and burglary, which underlay a felony murder conviction, should be vacated. *Leasure v. United States*, App. D.C., 458 A.2d 726 (1983).

Acquittal by reason of insanity of lesser included offense of assault. — Where the trial court found every fact required for conviction of the lesser included offense of assault, a predicate offense for an insanity verdict was established, and a judgment of acquittal of rape by reason of insanity was modified so as to state that defendant was adjudged not guilty by reason of insanity of the lesser included offense of assault. *Goudy v. United States*, App. D.C., 495 A.2d 744 (1985).

Voluntary statement admissible. — Where the police enter an apartment to charge someone with rape and he volunteers a statement, it is admissible. *Bosley v. United States*, 426 F.2d 1257 (D.C. Cir. 1970).

In a rape prosecution, the issue of the voluntariness of a confession is for the jury to determine. *Catoe v. United States*, 131 F.2d 16 (D.C. Cir. 1942); *De Lorenzo v. United States*, 219 F.2d 506 (D.C. Cir.), cert. denied, 349 U.S. 864, 75 S. Ct. 897, 99 L. Ed. 1286 (1955).

Accused entitled to examine complainant at preliminary hearing. — At a preliminary hearing to determine whether probable cause exists to hold the accused on a charge of rape, he is entitled to examine the complainant as his own witness absent the presentation of any reason why, if called, she should not be allowed to testify. *United States v. King*, 482 F.2d 768 (D.C. Cir. 1973).

But not entitled to new trial when nolle prosequi entered. — The defendant is not entitled to a new trial on the theory that he was deprived of his right to a preliminary hearing

when nolle prosequi was entered by the government to avoid questioning the complainant where an indictment is thereafter secured. *Wallace v. United States*, App. D.C., 362 A.2d 120 (1976).

Information does not have to contain the particular facts constituting the charged offense of attempted forcible rape. *Bush v. United States*, App. D.C., 215 A.2d 853 (1966).

Nor the complaining witness' name. — The complaining witness' name does not have to appear in the body of an attempted forcible rape information where her identity is readily available from the evidence. *Bush v. United States*, App. D.C., 215 A.2d 853 (1966).

Nor victim's age where forcible rape charged. — The inclusion in the information of the age of the alleged victim is unnecessary in a charge of forcible rape. *Bush v. United States*, App. D.C., 215 A.2d 853 (1966).

Joinder of counts found proper. — Where the similarity of circumstances surrounding 2 criminal episodes on which charges of rape while armed and armed robbery are based are sufficiently remarkable to prove that there is a reasonable probability that the same person committed the crimes, there is no prejudice in the joinder of both crimes in 1 trial. *United States v. Adams*, 481 F.2d 1099 (D.C. Cir. 1973).

In a prosecution for rape and assault with intent to rape, joinder of the offenses did not prejudice the defendant where because of the unusual factual similarities between the 2 offenses charged evidence of each crime would have been admissible in a separate trial of the other to show identity and motive and, in the case of the charge of assault with intent to rape, to show intent. *Crisafi v. United States*, App. D.C., 383 A.2d 1, cert. denied, 439 U.S. 931, 99 S. Ct. 322, 38 L. Ed. 2d 326 (1978).

Joinder of separate counts does not work undue prejudice. — Where defendant is charged under §§ 22-501 (assault), 22-2401 (murder), this section (rape), §§ 22-2901 (robbery), 22-3202 (crime with a weapon), and 22-3502 (sodomy), the allegations are, though similar in nature, separate and distinct. There is little likelihood of the charges being confused or treated as 1 event. Thus joinder of the counts against defendant does not work undue prejudice. *Bowyer v. United States*, App. D.C., 422 A.2d 973 (1980).

Refusal to sever counts found proper. — In a prosecution for 2 rapes, the court may deny a severance of 1 rape count from another where, while different times are involved, the methods employed are strikingly similar. *Arnold v. United States*, App. D.C., 358 A.2d 335 (1976), modified on other grounds, *Gary v. United States*, App. D.C., 499 A.2d 815 (1985), cert. denied, sub nom. *Cole v. United States*, 475 U.S. 1086, 106 S. Ct. 1470, 89 L. Ed. 2d

725, cert. denied, 477 U.S. 906, 106 S. Ct. 3279, 91 L. Ed. 2d 568 (1986).

In a prosecution for numerous offenses, including rape, the court may refuse to sever the counts on the basis of the separate dates of the alleged offenses, where all the offenses flowed each from the other, evidence of each would be admissible in separate trials to show motive, intent and identity and the evidence as to each offense is simple and direct, consisting of victim accounts, corroborated by eyewitness testimony. *Horton v. United States*, App. D.C., 377 A.2d 390 (1977).

The court may refuse to sever multiple rape counts of an indictment in view of the similar characteristics of the offenses. *Bridges v. United States*, App. D.C., 381 A.2d 1073 (1977), cert. denied, 439 U.S. 842, 99 S. Ct. 135, 58 L. Ed. 2d 141 (1978).

Exculpatory evidence should be given to accused. — Any exculpatory information in the government's possession should be given in accordance with a request, to one charged with rape. *District of Columbia v. Jackson*, App. D.C., 261 A.2d 511 (1970).

Jencks Act inapplicable where no statement recorded. — No foundation is laid for a Jencks Act hearing in a rape prosecution where it does not appear from the record that the police officer recorded a statement. *Wilburn v. United States*, App. D.C., 340 A.2d 810 (1975).

Refusal to obey discovery order constitutional. — The refusal of the government to comply with a pre-trial order granting an extensive discovery motion of one charged with rape does not then and there deprive the defendant of due process, equal protection of the law, effective assistance of counsel at trial, nor a "fair trial." *District of Columbia v. Jackson*, App. D.C., 261 A.2d 511 (1970).

And refusal to call all witnesses not considered on appeal where defendant unharmed. — That the failure of the government to call all of its witnesses whose names and addresses were given to the defendant took him by surprise cannot be urged on appeal from a conviction for rape where he does not allege or show that the witnesses were not available for him and makes no proffer of proof that their testimony would have helped him. *Robinson v. United States*, 128 F.2d 322 (D.C. Cir. 1942).

General indignation toward those who commit rape is not a "bias or prejudice", and it cannot be assumed that all juries impaneled at any given time will not give any defendant a fair trial. *Robinson v. United States*, 128 F.2d 322 (D.C. Cir. 1942).

Failure to excuse juror who knows witness abuse of discretion. — The failure to excuse a juror in a rape case after she states that she knows a crucial prosecution witness constituted an abuse of discretion. *Wilburn v. United States*, App. D.C., 340 A.2d 810 (1975).

Conduct of trial within court's discretion. — The order of proof and the conduct of the trial in a trial for rape is within the court's discretion. *Mears v. United States*, 55 F.2d 745 (D.C. Cir. 1932).

Burden of proof. — In a prosecution for rape, a not guilty verdict is necessary in the event of a failure by the government to prove each of the elements of the offense beyond a reasonable doubt. *McKenzie v. United States*, 126 F.2d 533 (D.C. Cir. 1942).

In a rape prosecution, the government is not required to establish that the act of sexual intercourse was forcibly consummated; it is enough that the victims are shown to have had a reasonable belief induced by threats that they faced death or serious bodily harm. *Arnold v. United States*, App. D.C., 358 A.2d 335 (1976), modified on other grounds, *Gary v. United States*, App. D.C., 499 A.2d 815 (1985), cert. denied, sub nom., *Cole v. United States*, 475 U.S. 1086, 106 S. Ct. 1470, 89 L. Ed. 2d 725, cert. denied, 477 U.S. 906, 106 S. Ct. 3279, 91 L. Ed. 2d 568 (1986).

Evidence of physical force and threats to overcome resistance and a final submission solely as the result of a fear of bodily injury is sufficient to establish lack of consent. *Smith v. United States*, App. D.C., 363 A.2d 667 (1976); *Boyd v. United States*, App. D.C., 473 A.2d 828 (1984).

Admissible evidence. — In a prosecution for rape, the admission into evidence of a manifest kept by a taxi driver is not error where the exhibit meets the requirements of the federal Business Records Act, in the absence of prejudice to the defendant. *Hines v. United States*, 220 F.2d 381 (D.C. Cir. 1955).

In a prosecution for rape, admitting into evidence certain articles of wearing apparel worn by the victim which were not turned over to the police until the morning after the crime is not error, where the reasons for the articles not being turned over until the next morning are adequately explained. *Hines v. United States*, 220 F.2d 381 (D.C. Cir. 1955).

In a prosecution for rape, testimony relating to a telephone call made by the complainant immediately after the alleged attack is properly received in evidence. *Smith v. United States*, 312 F.2d 867 (D.C. Cir. 1962).

Evidentiary considerations in determining reliability of identification. — In considering the reliability of an identification made at a showup conducted on the street, evidence of reliability may be considered, such as the opportunity to observe appellant during the rape and the showup as a result of the length of the encounter, the good lighting and the complainant's attentiveness, and the proximity in time between the rape and the showup. *Wilkerson v. United States*, App. D.C., 427 A.2d

923, cert. denied, 454 U.S. 852, 102 S. Ct. 295, 70 L. Ed. 2d 143 (1981).

Identification in a prosecution for rape may be established from fingerprint evidence. *United States v. Cary*, 470 F.2d 469 (D.C. Cir. 1972).

The defendant is not denied due process or a fair trial where the court admits evidence about another rape with which he was not charged, where the assault is described only briefly in order to explain the offense actually charged, where there are no questions that directly elicit information, where the incident is not described in inflammatory terms or in any detail, and where there is substantial evidence of guilt of the offense and the testimony is only minor portion of the evidence adduced at trial. *Davis v. United States*, App. D.C., 367 A.2d 1254 (1976), cert. denied, 434 U.S. 847, 98 S. Ct. 154, 54 L. Ed. 2d 114 (1977).

Where the jury is instructed by stipulation that there had been physical penetration of the penis into the vagina, photographs of complainant's body were still relevant and necessary to meet the burden of proof on the element of force. *Wilkerson v. United States*, App. D.C., 427 A.2d 923, cert. denied, 454 U.S. 852, 102 S. Ct. 295, 70 L. Ed. 2d 143 (1981).

The admission of a post-mortem photograph of a rape/murder victim into evidence in the trial of her accused assailants was probative in that it identified the victim and showed the extent of injuries. *Leasure v. United States*, App. D.C., 458 A.2d 726 (1983).

Evidence relevant to show defendant's identity. *Wheeler v. United States*, App. D.C., 470 A.2d 761 (1983).

Admission into evidence of knife recovered by the police from defendant's car some 16 hours after he allegedly raped victim at knife point was proper. *Lee v. United States*, App. D.C., 471 A.2d 683 (1984).

Inadmissible evidence. — The court, in a rape prosecution, may exclude as hearsay the testimony of a woman living with the defendant concerning a beating which the victim allegedly sustained at the hands of her former boyfriend. *Edmondson v. United States*, App. D.C., 346 A.2d 515 (1975).

Testimony admissible under spontaneous utterance exception to hearsay rule. — The testimony of the police officer who came upon the rape victim immediately after she had been attacked and the testimony of the nurse tending to her serious physical injuries after she was transported to the hospital subsequent to the attack, who both testified that the victim had stated that she had been raped, were admissible into evidence as a spontaneous utterance exception to the hearsay rule. *Leasure v. United States*, App. D.C., 458 A.2d 726 (1983).

Government should explain test used for laboratory reports. — Where the government offers into evidence laboratory reports concerning the presence of sperm in the vagina of the victim of a sexual assault, it should not fail to develop an explanation of the relative routineness of the test used and its degree of medical reliability. *Smith v. United States*, App. D.C., 337 A.2d 219 (1975).

Foundation for admitting DNA evidence. — It was not necessary for the prosecution to prove, in order for DNA evidence to be admitted, that there was a scientific consensus as to the precise probability of a coincidental match; so long as there was a consensus that the chances of such a match were no greater than some very small fraction, then the evidence was probative and should have been admitted on an appropriately conservative basis. *United States v. Porter*, App. D.C., 618 A.2d 629 (1992).

Absence of pubic hair at rape scene insignificant. — The absence of the defendant's pubic hair at the scene of the alleged rape is not indicative of innocence. *Smith v. United States*, App. D.C., 363 A.2d 667 (1976).

Delay in complaint affects complainant's credibility. — In a rape case, a delay in making a complaint may seriously affect the credibility of the complaining witness. *Stitely v. United States*, App. D.C., 61 A.2d 491 (1948).

Examining physician expert medical witness. — The physician who examined the victim is allowed to testify as an expert medical witness in a prosecution for rape. *Grady v. United States*, App. D.C., 376 A.2d 437 (1977).

Impeachment allowed. — In a prosecution for carnally knowing and abusing a female child under the age of 16 years, a statement of the child which she gave to the police may be used to impeach her testimony. *Wheeler v. United States*, 211 F.2d 19 (D.C. Cir. 1953), cert. denied, 347 U.S. 1019, 74 S. Ct. 876, 98 L. Ed. 1140 (1954).

Permitting an impeachment, in a prosecution for rape, of a defense witness by means of a question as to whether he has been convicted of rape does not constitute plain error. *United States v. Huff*, 442 F.2d 885 (D.C. Cir. 1971).

Use of bias evidence to impeach police officer, who testified for the defense, was not improper. *Staton v. United States*, App. D.C., 466 A.2d 1245 (1983).

Corroboration eliminated. — Both the need for corroboration evidence in rape offenses as to the sufficiency of evidence and a jury instruction that it must find corroboration have been eliminated. *United States v. Sheppard*, 569 F.2d 114 (D.C. Cir. 1977); *Davis v. United States*, App. D.C., 396 A.2d 979 (1979); *Gary v. United States*, App. D.C., 499 A.2d 815 (1985), cert. denied, 475 U.S. 1086, 106 S. Ct. 1470, 89

L. Ed. 2d 725, 477 U.S. 906, 106 S. Ct. 3279, 91 L. Ed. 2d 568 (1986).

But rule in force at time of trial still applies. — Where the corroboration rule was still in force in the District at the time of the defendant's trial for rape, it applied both in the trial court and on appeal. *Davis v. United States*, App. D.C., 370 A.2d 1337, cert. denied, 434 U.S. 853, 98 S. Ct. 168, 54 L. Ed. 2d 123 (1977).

And District's corroboration rule still applicable to other offenses. — The holding in *Arnold v. United States*, App. D.C., 358 A.2d 335 (1976), abrogating the corroboration rule, is limited to rape and its lesser included offenses. *Griffin v. United States*, App. D.C., 396 A.2d 211 (1978), but see, *Gary v. United States*, App. D.C., 499 A.2d 815 (1985), cert. denied, sub nom. *Cole v. United States*, 475 U.S. 1086, 106 S. Ct. 1470, 89 L. Ed. 725, cert. denied, 477 U.S. 906, 106 S. Ct. 3279, 91 L. Ed. 2d 568 (1986), and *Moore v. United States*, App. D.C., 609 A.2d 1133 (1992).

Statements and arguments made by counsel are not evidence. *Davis v. United States*, App. D.C., 367 A.2d 1254 (1976), cert. denied, 434 U.S. 847, 98 S. Ct. 154, 54 L. Ed. 2d 114 (1977).

Prosecutor's remarks found improper. — In a prosecution for rape, the remarks of the prosecutor are improper where he asks the defendant if he is a "sex fiend." *Hall v. United States*, 171 F.2d 347 (D.C. Cir. 1948).

In a prosecution for rape, the prosecuting attorney cannot comment to the jury that only a single woman survived the defense challenge to the jurors. *McGuinn v. United States*, 191 F.2d 477 (D.C. Cir. 1951).

In a prosecution for rape, the prosecutor cannot imply that medical records which show no evidence of rape are damaging to the defendant. *Smith v. United States*, 312 F.2d 867 (D.C. Cir. 1962).

The prosecutor's characterizing the defendant in a rape action as a hoodlum walking the streets is improper and should be condemned by the court, sua sponte, in the presence of the jury. *United States v. Jenkins*, 436 F.2d 140 (D.C. Cir. 1970).

Defense counsel's remarks found improper. — A statement by the counsel for the defendant in his closing argument in a prosecution for rape that a verdict of guilty is proper under the circumstances and evidence is a defect affecting "substantial rights." *Tatum v. United States*, 190 F.2d 612 (D.C. Cir. 1951).

Jury alone determines guilt or innocence. — In a prosecution for rape, notwithstanding a concession of guilt by his counsel, the defendant is entitled to have the jury alone determine his guilt or innocence. *Tatum v. United States*, 190 F.2d 612 (D.C. Cir. 1951).

Evidence may require instruction on simple assault. — The evidence in a prosecution for rape and assault with intent to commit rape may require an instruction on the lesser offense of simple assault. *United States v. Huff*, 442 F.2d 885 (D.C. Cir. 1971).

Unanimity instruction. — If a single count encompasses 2 or more factually or legally separate incidents, the trial court is required to instruct the jury that it must reach unanimous agreement as to the incident or incidents. *Gray v. United States*, App. D.C., 544 A.2d 1255 (1988).

When a single count is charged and the facts show a continuing course of conduct, rather than a succession of clearly detached incidents, a special unanimity instruction is unnecessary, absent some factor that differentiates the facts on legal grounds. A continuing course of conduct may be found even though there has been some spatial or temporal separation between assaultive acts or interruption by outsiders or actions by the participants themselves. *Gray v. United States*, App. D.C., 544 A.2d 1255 (1988).

Instructions on lesser included offense. — Where in defendant's trial on armed rape and sodomy charges, both as principal and as aider and abettor, there was no substantive evidence from the prosecution or the defense that the assault was other than sexually motivated, the court did not abuse its discretion in declining to give the requested instruction on the lesser included offense of simple assault. *Cain v. United States*, App. D.C., 532 A.2d 1001 (1987).

Where identification not convincing, jury should acquit. — In a prosecution for rape, where the verity of the identification of the accused by the prosecuting witness is point on which the case turns, if the circumstances of the identification are not convincing, the jury should acquit. *McKenzie v. United States*, 126 F.2d 533 (D.C. Cir. 1942).

Sentence vacated where record doubtful on due process. — In a rape prosecution, where the record leaves serious doubt as to whether the defendant enjoyed due process of law, he is entitled to have his sentence vacated. *Mason v. United States*, 193 F.2d 23 (D.C. Cir. 1951).

But conviction affirmed where no error and supporting evidence. — Where the record presents no reversible error and the evidence supports a conviction for rape, the conviction is affirmed. *Clinton v. United States*, 151 F.2d 12 (D.C. Cir. 1945).

Speedy trial not denied where defendant voluntarily enters plea. — Even where over a year elapses between the award of a new trial on a rape charge and the date the defendant is sentenced after he voluntarily enters a plea, he is not deprived of a speedy trial. *United*

States v. Lindsey, 178 F. Supp. 598 (D.D.C. 1959).

Evidence sufficient to sustain conviction. — Although, due to complainant's inability to identify her assailant at trial, the evidence against defendant on the charges was

circumstantial, the cumulative weight of this evidence was more than sufficient to sustain the jury's finding that appellant was guilty of the offenses of rape, robbery and kidnapping beyond a reasonable doubt. *White v. United States*, App. D.C., 484 A.2d 553 (1984).

§ 22-4103. Second degree sexual abuse.

A person shall be imprisoned for not more than 20 years and may be fined in an amount not to exceed \$200,000, if that person engages in or causes another person to engage in or submit to a sexual act in the following manner:

(1) By threatening or placing that other person in reasonable fear (other than by threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping); or

(2) Where the person knows or has reason to know that the other person is:

(A) Incapable of appraising the nature of the conduct;

(B) Incapable of declining participation in that sexual act; or

(C) Incapable of communicating unwillingness to engage in that sexual act. (May 23, 1995, D.C. Law 10-257, § 202, 42 DCR 53.)

Section references. — This section is referred to in §§ 22-4107 and 22-4110.

Legislative history of Law 10-257. — See note to § 22-4101.

Force not required where victim has mind of child. — The dispensing of the element of force in cases involving rapes of children under 16 years of age applies in a prosecution for assault with intent to rape where the victim has the mind of a child. *United States v. Medley*, 452 F.2d 1325 (D.C. Cir. 1971).

Child demonstrating ability to recollect competent to testify. — Where her testimony demonstrates her ability to recollect events, child is competent to testify in a prosecution for rape. *Edmondson v. United States*, App. D.C., 346 A.2d 515 (1975).

And absence of bad motive coupled with maturity, lends credence to testimony. —

In a prosecution for carnal knowledge of a female child under 16 years of age, the absence of any evidence tending to show a motive for fabrication, coupled with the maturity that the victim demonstrates, lends inherent credence to her testimony. *United States v. Jones*, 477 F.2d 1213 (D.C. Cir. 1973).

Generally, sexual assault charges by mentally abnormal girl are subjected to great scrutiny. *United States v. Benn*, 476 F.2d 1127 (D.C. Cir. 1972).

Psychological examination of complaining minor. — See *United States v. Gonzales*, 114 WLR 13 (Super. Ct. 1986).

§ 22-4104. Third degree sexual abuse.

A person shall be imprisoned for not more than 10 years and may be fined in an amount not to exceed \$100,000, if that person engages in or causes sexual contact with or by another person in the following manner:

(1) By using force against that other person;

(2) By threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping;

(3) After rendering that person unconscious; or

(4) After administering to that person by force or threat of force, or without the knowledge or permission of that other person, a drug, intoxicant, or similar substance that substantially impairs the ability of that other person to appraise or control his or her conduct. (May 23, 1995, D.C. Law 10-257, § 203, 42 DCR 53.)

Section references. — This section is referred to in §§ 22-4107 and 22-4110.

Legislative history of Law 10-257. — See note to § 22-4101.

§ 22-4105. Fourth degree sexual abuse.

A person shall be imprisoned for not more than 5 years and, in addition, may be fined in an amount not to exceed \$50,000, if that person engages in or causes sexual contact with or by another person in the following manner:

(1) By threatening or placing that other person in reasonable fear (other than by threatening or placing that other person in reasonable fear that any person will be subjected to death, bodily injury, or kidnapping); or

(2) Where the person knows or has reason to know that the other person is:

(A) Incapable of appraising the nature of the conduct;

(B) Incapable of declining participation in that sexual contact; or

(C) Incapable of communicating unwillingness to engage in that sexual contact. (May 23, 1995, D.C. Law 10-257, § 204, 42 DCR 53.)

Section references. — This section is referred to in §§ 22-4107 and 22-4110.

Legislative history of Law 10-257. — See note to § 22-4101.

Offense of carnal knowledge was not lesser included offense of rape. Ballard v. United States, App. D.C., 430 A.2d 483 (1981).

Inadmissible evidence. — In a prosecution for carnal knowledge, where the examining physician is unavailable, the report of his medical examination is not admissible. Whittaker v. United States, 281 F.2d 631 (D.C. Cir. 1960).

§ 22-4106. Misdemeanor sexual abuse.

Whoever engages in a sexual act or sexual contact with another person and who should have knowledge or reason to know that the act was committed without that other person's permission, shall be imprisoned for not more than 180 days and, in addition, may be fined in an amount not to exceed \$1,000. (May 23, 1995, D.C. Law 10-257, § 205, 42 DCR 53.)

Section references. — This section is referred to in §§ 22-4107 and 22-4110.

Legislative history of Law 10-257. — See note to § 22-4101.

§ 22-4107. Defense to sexual abuse.

Consent by the victim is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-4102 to 22-4106, prosecuted alone or in conjunction with charges under § 22-4118 or §§ 22-501 and 22-503. (May 23, 1995, D.C. Law 10-257, § 206, 42 DCR 53.)

Legislative history of Law 10-257. — See note to § 22-4101.

In prosecution for rape, there must be absence of consent by complaining witness to warrant a conviction, unless consent was induced by putting her in fear of grave bodily harm or death or by the exercise of actual force against her person. McGuinn v. United States, 191 F.2d 477 (D.C. Cir. 1951).

But rape is without "consent" where re-

sistance overcome by force and threats. — Where resistance is overcome by physical force and threats which put one in fear of one's life, the act of rape is without "consent." Ewing v. United States, 135 F.2d 633 (D.C. Cir. 1942), cert. denied, 318 U.S. 776, 63 S. Ct. 829, 87 L. Ed. 1145 (1943).

And, in a rape, utmost resistance by the victim is not required. McGuinn v. United States, 191 F.2d 477 (D.C. Cir. 1951).

Absence of opposition cannot be assumed. — In a rape, it cannot be assumed that the victim did not offer opposition. *McGuinn v. United States*, 191 F.2d 477 (D.C. Cir. 1951).

In a prosecution for rape, insanity is a defense. — *Holloway v. United States*, 148 F.2d 665 (D.C. Cir. 1945), cert. denied, 334 U.S. 852, 68 S. Ct. 1507, 92 L. Ed. 1774 (1948); *Tatum v. United States*, 190 F.2d 612 (D.C. Cir. 1951).

Evidence in a prosecution for rape may raise the defense of insanity. *Tatum v. United States*, 190 F.2d 612 (D.C. Cir. 1951).

But post-conviction sanity inquisition denied. — After a conviction of rape, a sanity inquisition is denied when it has not occurred to either his counsel or to the court that the defendant was mentally irresponsible. *Jackson v. United States*, 25 F.2d 549 (D.C. Cir. 1928).

For such a crime as rape, there can

never be any extenuating circumstances. *Holmes v. United States*, 171 F.2d 1022 (D.C. Cir. 1948).

Relevant evidence. — Testimony that a complainant's behavior following a rape changed in a number of ways that were arguably inconsistent with a defendant's defense of consent, could reasonably support a conclusion that the evidence made it more probable that she did not consent to intercourse with defendant, and such evidence meets the threshold test of relevance. *Street v. United States*, App. D.C., 602 A.2d 141 (1992).

Impeachment allowed. — In a prosecution for rape, where the defendant admits sex relations and testifies that the prosecutrix consented, the prosecutor is allowed to impeach his credibility. *Smith v. United States*, 312 F.2d 867 (D.C. Cir. 1962).

§ 22-4108. First degree child sexual abuse.

Whoever, being at least 4 years older than a child, engages in a sexual act with that child or causes that child to engage in a sexual act shall be imprisoned for any term of years or for life and, in addition, may be fined an amount not to exceed \$250,000. (May 23, 1995, D.C. Law 10-257, § 207, 42 DCR 53.)

Section references. — This section is referred to in §§ 22-4110, 22-4111, and 22-4112.

Legislative history of Law 10-257. — See note to § 22-4101.

Corpus delicti requisite element of evidence. — A requisite element of evidence in a prosecution for taking indecent liberties with a minor child is the establishment of the corpus delicti. *Jones v. United States*, 231 F.2d 244 (D.C. Cir. 1956).

Specific intent inferable from accused's actions. — In a prosecution for taking indecent liberties with a minor, the specific intent to arouse the accused may be inferred from his actions. *Evans v. United States*, App. D.C., 299 A.2d 136 (1973).

And evidence sufficient to infer intent. — Evidence that the defendant inserted his hands in the pants of the complainant around her pubic area, inserted his finger in her vagina, and massaged her breasts is sufficient to give rise to an inference that there was a specific intent to arouse his lust, passion or sexual desires. *Evans v. United States*, App. D.C., 299 A.2d 136 (1973).

Attempt to expose genitals demonstrates sexual purpose. — An aborted attempt to expose a child's genitals, as evidenced by removing her pants, fairly can be said to demonstrate a sexual purpose within the terms of this section. *Moore v. United States*, App. D.C., 306 A.2d 278 (1973).

Indictment failing to give date and time of offenses against minor children held sufficient. — See *Jackson v. United States*, App. D.C., 503 A.2d 1225 (1986).

Thirteen-month delay between arrest and trial held not deprivation of speedy trial. — See *Jackson v. United States*, App. D.C., 503 A.2d 1225 (1986).

Refusal of voir dire question on legality of sexual act not error. — The refusal in a prosecution for taking indecent liberties with a child, to permit the accused to ask on voir dire "Is there anyone here who feels that sexual acts with a minor are either immoral, illegal or indecent" is not error. *Davis v. United States*, App. D.C., 315 A.2d 157 (1974).

Nor refusing discovery of names and addresses of government witnesses of tender age. — The refusal, in a criminal prosecution for taking indecent liberties with a minor in which the potential government witnesses are of tender age, to grant the discovery of the names and addresses of these witnesses is not an abuse of discretion. *Davis v. United States*, App. D.C., 315 A.2d 157 (1974).

Nor refusing access to complainant's unblemished school records. — The refusal to grant access to the complaining witness' subpoenaed school records which reflect no prior homosexual or other serious behavioral problems is not reversible error. *Davis v. United States*, App. D.C., 315 A.2d 157 (1974).

Admissible evidence. — Where the defendant is charged with having carnally known and abused a child, victim's statement, made immediately after the alleged attack, may be admissible under the spontaneous exclamation exception to the hearsay rule. *Wheeler v. United States*, 211 F.2d 19 (D.C. Cir. 1953), cert. denied, 347 U.S. 1019, 74 S. Ct. 876, 98 L. Ed. 1140 (1954).

In a prosecution for taking indecent liberties with a child who is incompetent to testify, her mother's testimony as to her statement of what the defendant did to her is admissible as a spontaneous declaration but is insufficient to support a conviction. *Jones v. United States*, 231 F.2d 244 (D.C. Cir. 1956).

In a prosecution for carnal knowledge of a female child, the admission of the defendant's photograph which was identified by the victim is not error. *United States v. Jones*, 477 F.2d 1213 (D.C. Cir. 1973).

In a prosecution for taking indecent liberties with a minor child, in which the testimony of the complaining witness is a comprehensible and internally consistent account of what happened, its admission is not an abuse of discretion. *Johnson v. United States*, App. D.C., 364 A.2d 1198 (1976).

Evidence of other crimes of a sexual nature involving teenage girls similar to the current charges against the defendant was admissible under a long established Drew-type exception, even though it is not specifically mentioned in *Drew v. United States*, 118 U.S. App. D.C. 11, 331 F.2d 85 (1964), which allows proof of a defendant's past sexual misconduct, similar to the sexual misconduct for which he is being tried, in order to show that he has an "unusual sexual preference." *Johnson v. United States*, App. D.C., 610 A.2d 729 (1992).

Inadmissible evidence. — In a prosecution for taking indecent liberties with a female child, the testimony of the officer investigating the crime as to what someone told him the child said is prejudicial where there is no other testimony that the child identified the person who molested her. *Pinkard v. United States*, 240 F.2d 632 (D.C. Cir. 1957).

In a prosecution for taking indecent liberties with a child, where the examining physician is unavailable, the report of his medical examination is not admissible. *Whittaker v. United States*, 281 F.2d 631 (D.C. Cir. 1960).

Competency of child witness. — Two requirements must be satisfied before a child witness can be found competent to testify: (1) The child must be able to recall the events which are the subject of the testimony; and (2) the child must understand the difference between truth and falsehood and appreciate the duty to tell the truth. In order to make its determination of competency, a preliminary examination is appropriate for a child witness of

tender years. *Barnes v. United States*, App. D.C., 600 A.2d 821 (1991).

The appellate court may consider the actual trial testimony of the child witness when evaluating whether the trial court's exercise of discretion was clearly erroneous. *Barnes v. United States*, App. D.C., 600 A.2d 821 (1991).

There was no abuse of discretion in the trial court's finding of competency of a child witness (7 years old at time of trial, 6 years old at time of incident). *Barnes v. United States*, App. D.C., 600 A.2d 821 (1991).

With young children, judge may conduct preliminary hearing on issue of testimonial maturity. *United States v. Schoefield*, 465 F.2d 560 (D.C. Cir.), cert. denied, 409 U.S. 881, 93 S. Ct. 210, 34 L. Ed. 2d 136 (1972).

Closed circuit television testimony by child witness. — There is no hint in *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3167, 111 L.Ed.2d 666 (1990) that, to satisfy the Confrontation Clause, a court cannot permit a closed circuit television procedure for a child witness in the absence of an authorizing statute. All that is required is trial court findings reflecting compliance with the three "necessity" criteria specified in *Craig*. *Hicks-Bey v. United States*, App. D.C., 649 A.2d 569 (1994), cert. denied, — U.S. —, 116 S. Ct. 251, 133 L. Ed. 2d 176 (1995).

The demonstration of "necessity" as set forth in *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) requires three trial court findings specific to the case: (1) The trial court must hear evidence and determine whether use of the one-way closed-circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify; (2) the trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant; (3) finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i.e., more than "mere nervousness or excitement or some reluctance to testify." *Hicks-Bey v. United States*, App. D.C., 649 A.2d 569 (1994), cert. denied, — U.S. —, 116 S. Ct. 251, 133 L. Ed. 2d 176 (1995).

Psychological examination of complaining minor. — See *United States v. Gonzales*, 114 WLR 13 (Super. Ct. 1986).

Weight given complainant's testimony matter for jury. — Where the court finds that the complainant in an indecent liberties case demonstrates an understanding of her duty to tell the truth and a capability to observe and remember, the weight to be given her testimony is a matter for determination by the jury. *Robinson v. United States*, App. D.C., 357 A.2d 412 (1976).

Judge has discretion to decide when statement about sex crime is spontaneous

utterance. *Fitzgerald v. United States*, App. D.C., 412 A.2d 1 (1980).

Prosecutor's statement that defendant's testimony fabricated impermissible. — The statement of the prosecutor that the defendant's testimony was a recent fabrication designed to lure the jury and hoodwink them is not permissible. *Gibson v. United States*, 403 F.2d 569 (D.C. Cir. 1968).

Requirement of independent corroboration of charges of sexual assault against minors abolished. — In 1985 the Council of the District of Columbia repealed the requirement of independent corroboration of charges of sexual assault against minors. *Barrera v. United States*, App. D.C., 599 A.2d 1119 (1991).

Jury cannot convict on grounds not charged. — In a prosecution for taking indecent liberties with minors, the jury cannot convict on grounds not charged. *Evans v. United States*, App. D.C., 299 A.2d 136 (1973).

Convictions for taking indecent liberties and sodomy merged. — A defendant's convictions for taking indecent liberties with two children living with him merged with his convictions for sodomy with those children, so that the convictions for taking indecent liberties were required to be vacated. *Jackson v. United States*, App. D.C., 503 A.2d 1225 (1986).

Indecent liberties merges with sodomy where there is a single incident. *Watson v. United States*, App. D.C., 524 A.2d 736 (1987).

§ 22-4109. Second degree child sexual abuse.

Whoever, being at least 4 years older than a child, engages in sexual contact with that child or causes that child to engage in sexual contact shall be imprisoned for not more than 10 years and, in addition, may be fined in an amount not to exceed \$100,000. (May 23, 1995, D.C. Law 10-257, § 208, 42 DCR 53.)

Section references. — This section is referred to in §§ 22-4110, 22-4111, and 22-4112.

Legislative history of Law 10-257. — See note to § 22-4101.

§ 22-4110. Enticing a child.

Whoever, being at least 4 years older than a child, takes that child to any place, or entices, allures, or persuades a child to go to any place for the purpose of committing any offense set forth in §§ 22-4102 to 22-4106 and §§ 22-4108 and 22-4109 shall be imprisoned for not more than 5 years and, in addition, may be fined in an amount not to exceed \$50,000. (May 23, 1995, D.C. Law 10-257, § 209, 42 DCR 53.)

Section references. — This section is referred to in §§ 22-4111 and 22-4112.

Legislative history of Law 10-257. — See note to § 22-4101.

Crimes of enticement and sodomy merged. — Legislative history supports the

fact that former subsection (d) of this section as enacted was meant to merge the crime of enticement with sodomy. *Watson v. United States*, App. D.C., 524 A.2d 736 (1987).

§ 22-4111. Defenses to child sexual abuse.

(a) Neither mistake of age nor consent is a defense to a prosecution under §§ 22-4108 to 22-4110, prosecuted alone or in conjunction with charges under § 22-4118 or § 22-503.

(b) Marriage between the defendant and the child at the time of the offense is a defense, which the defendant must establish by a preponderance of the evidence, to a prosecution under §§ 22-4108 to 22-4110, prosecuted alone or in conjunction with charges under § 22-4118 or § 22-503, involving only the defendant and the child. (May 23, 1995, D.C. Law 10-257, § 210, 42 DCR 53.)

Legislative history of Law 10-257. — See note to § 22-4101.

Insanity defense. — In a prosecution for taking indecent liberties with a child, the defense of insanity may be utilized. *United States v. Plummer*, 171 F. Supp. 1 (D.D.C. 1959).

Inquiry at a competency hearing should embrace the mental condition of the defendant at the time of the alleged offense, what kind of judgment or sentence is appropriate, and what kind of disposition should be made, including a possible civil commitment. *Fuller v. United States*, 390 F.2d 468 (D.C. Cir. 1967).

Where significant insanity evidence introduced, government has burden of proof. — Where significant evidence of insan-

ity is introduced in a trial for taking immoral liberties, the prosecution has the burden of proving sanity beyond a reasonable doubt. *Goforth v. United States*, 269 F.2d 778 (D.C. Cir. 1959).

And court should instruct on sanity. — In a prosecution for taking immoral liberties with a female child under 16 years of age, where significant evidence of insanity is introduced, the court should instruct on sanity. *Goforth v. United States*, 269 F.2d 778 (D.C. Cir. 1959).

Consent by child is no defense to this section. *Hall v. United States*, App. D.C., 400 A.2d 1063 (1979).

§ 22-4112. State of mind proof requirement.

In a prosecution under §§ 22-4108 to 22-4110, prosecuted alone or in conjunction with charges under § 22-4118 or § 22-503, the government need not prove that the defendant knew the child's age or the age difference between himself or herself and the child. (May 23, 1995, D.C. Law 10-257, § 211, 42 DCR 53.)

Legislative history of Law 10-257. — See note to § 22-4101.

§ 22-4113. First degree sexual abuse of a ward.

Whoever engages in a sexual act with another person or causes another person to engage in or submit to a sexual act when that other person:

(1) Is in official custody, or is a ward or resident, on a permanent or temporary basis, of a hospital, treatment facility, or other institution; and

(2) Is under the supervisory or disciplinary authority of the actor shall be imprisoned for not more than 10 years and, in addition, may be fined in an amount not to exceed \$100,000. (May 23, 1995, D.C. Law 10-257, § 212, 42 DCR 53; _____, 1996, D.C. Law 11- (Act 11-198), § 6(a), 43 DCR 528.)

Section references. — This section is referred to in § 22-4117.

Effect of amendments. — D.C. Law 11- (Act 11-198) validated a previously made correction in (2).

Legislative history of Law 10-257. — See note to § 22-4101.

Legislative history of Law 11- (Act 11-198). — Law 11- (Act 11-198), the "Criminal Code Technical Amendments Act of 1996," was introduced in Council and assigned Bill No. 11-484, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on December 5, 1995, and January 4, 1996, respectively. Signed by the Mayor on January 26, 1996, it was assigned Act No. 11-198 and transmitted to both Houses of Congress for its review. D.C. Law 11- (Act

11-198) is projected to become law on May 16, 1996.

Closed circuit television testimony by child witness. — There is no hint in *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3167, 111 L. Ed. 2d 666 (1990) that, to satisfy the Confrontation Clause, a court cannot permit a closed circuit television procedure for a child witness in the absence of an authorizing statute; all that is required is trial court findings reflecting compliance with the three "necessity" criteria specified in *Craig*. *Hicks-Bey v. United States*, App. D.C., 649 A.2d 569 (1994), cert. denied, — U.S. —, 116 S. Ct. 251, 133 L. Ed. 2d 176 (1995).

The demonstration of "necessity" as set forth in *Maryland v. Craig*, 497 U.S. 836, 110 S. Ct. 3157, 111 L. Ed. 2d 666 (1990) requires three trial court findings specific to the case: (1) the

trial court must hear evidence and determine whether use of the one-way closed-circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify; (2) the trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant; and (3) the trial

court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i.e., more than mere nervousness or excitement or some reluctance to testify. *Hicks-Bey v. United States*, App. D.C., 649 A.2d 569 (1994), cert. denied, — U.S. —, 116 S. Ct. 251, 133 L. Ed. 2d 176 (1995).

§ 22-4114. Second degree sexual abuse of a ward.

Whoever engages in sexual contact with another person or causes another person to engage in or submit to sexual contact when that other person:

- (1) Is in official custody, or is a ward or resident, on a permanent or temporary basis, of a hospital, treatment facility, or other institution; and
- (2) Is under the supervisory or disciplinary authority of the actor shall be imprisoned for not more than 5 years and, in addition, may be fined in an amount not to exceed \$50,000. (May 23, 1995, D.C. Law 10-257, § 213, 42 DCR 53.)

Section references. — This section is referred to in § 22-4117.

Legislative history of Law 10-257. — See note to § 22-4101.

§ 22-4115. First degree sexual abuse of a patient or client.

(a) A person is guilty of first degree sexual abuse who purports to provide, in any manner, professional services of a medical, therapeutic, or counseling (whether legal, spiritual, or otherwise) nature, and engages in a sexual act with another person who is a patient or client of the actor, or is otherwise in a professional relationship of trust with the actor; and

(1) The actor represents falsely that the sexual act is for a bona fide medical or therapeutic purpose, or for a bona fide professional purpose for which the services are being provided; or

(2) The nature of the treatment or service provided by the actor and the mental, emotional, or physical condition of the patient or client are such that the actor knows or has reason to know that the patient or client is impaired from declining participation in the sexual act.

(b) Any person found guilty pursuant to subsection (a) of this section shall be imprisoned for not more than 10 years and, in addition, may be fined in an amount not to exceed \$100,000. (May 23, 1995, D.C. Law 10-257, § 214, 42 DCR 53; _____, 1996, D.C. Law 11- (Act 11-198), § 6(b), 43 DCR 528.)

Section references. — This section is referred to in § 22-4117.

Effect of amendments. — D.C. Law 11- (Act 11-198) substituted “more than 10” for “more than 10” in (b).

Legislative history of Law 10-257. — See note to § 22-4101.

Legislative history of Law 11- (Act 11-198). — See note to § 22-4113.

§ 22-4116. Second degree sexual abuse of a patient or client.

(a) A person is guilty of second degree sexual abuse who purports to provide, in any manner, professional services of a medical, therapeutic, or counseling (whether legal, spiritual, or otherwise) nature, and engages in a sexual contact with another person who is a patient or client of the actor, or is otherwise in a professional relationship of trust with the actor; and

(1) The actor represents falsely that the sexual contact is for a bona fide medical or therapeutic purpose, or for a bona fide professional purpose for which the services are being provided; or

(2) The nature of the treatment or service provided by the actor and the mental, emotional, or physical condition of the patient or client are such that the actor knows or has reason to know that the patient or client is impaired from declining participation in the sexual contact.

(b) Any person found guilty pursuant to subsection (a) of this section shall be imprisoned for not more than 5 years and, in addition, may be fined in an amount not to exceed \$50,000. (May 23, 1995, D.C. Law 10-257, § 215, 42 DCR 53.)

Section references. — This section is referred to in § 22-4117.

Legislative history of Law 10-257. — See note to § 22-4101.

§ 22-4117. Defenses to sexual abuse of a ward, patient, or client.

(a) Consent is not a defense to a prosecution under §§ 22-4113 to 22-4116, prosecuted alone or in conjunction with charges under § 22-4118.

(b) Marriage between the defendant and victim at the time of the offense is a defense, which the defendant must prove by a preponderance of the evidence, to a prosecution under §§ 22-4113 to 22-4116, prosecuted alone or in conjunction with charges under § 22-4118. (May 23, 1995, D.C. Law 10-257, § 216, 42 DCR 53.)

Legislative history of Law 10-257. — See note to § 22-4101.

§ 22-4118. Attempts to commit sexual offenses.

Any person who attempts to commit an offense under this subchapter shall be imprisoned for a term of years not to exceed 15 years where the maximum prison term authorized for the offense is life or for not more than ½ of the maximum prison sentence authorized for the offense and, in addition, may be fined an amount not to exceed ½ of the maximum fine authorized for the offense. (May 23, 1995, D.C. Law 10-257, § 217, 42 DCR 53.)

Section references. — This section is referred to in §§ 22-4107, 22-4111, 22-4112, and 22-4117.

Legislative history of Law 10-257. — See note to § 22-4101.

Evidence not required to sustain conviction.

tion. — Medical evidence of sexual intercourse is not required to sustain a conviction of attempted carnal knowledge of a female child under 16 years of age. *In re W.E.P.*, App. D.C., 318 A.2d 286 (1974).

Motion to correct sentence authorized at any time. — Upon a sentence on a conviction of assault with intent to rape, a motion to correct the sentence may be made at any time.

Holloway v. United States, 191 F.2d 504 (D.C. Cir. 1951).

Merger. — Convictions for attempted rape and for taking indecent liberties with a child do not merge, as attempted rape includes the additional element of force, and there is no indication that the legislature intended to prevent such simultaneous convictions. *Cowan v. United States*, App. D.C., 547 A.2d 1011 (1988).

§ 22-4119. No spousal immunity from prosecution.

No actor is immune from prosecution under any section of this subchapter because of marriage or cohabitation with the victim; provided, however, that marriage of the parties may be asserted as an affirmative defense in a prosecution under this subchapter where it is expressly so provided. (May 23, 1995, D.C. Law 10-257, § 218, 42 DCR 53.)

Legislative history of Law 10-257. — See note to § 22-4101.

§ 22-4120. Aggravating circumstances.

(a) Any person who is found guilty of an offense under this subchapter may receive a penalty up to 1½ times the maximum penalty prescribed for the particular offense, and may receive a life sentence without parole, if life imprisonment is the maximum penalty prescribed for the offense, if any of the following aggravating circumstances exists:

- (1) The victim was under the age of 12 years at the time of the offense;
- (2) The victim was under the age of 18 years at the time of the offense and the actor had a significant relationship to the victim;
- (3) The victim sustained serious bodily injury as a result of the offense;
- (4) The defendant was aided or abetted by 1 or more accomplices;
- (5) The defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories; or
- (6) The defendant was armed with, or had readily available, a pistol or other firearm (or imitation thereof) or other dangerous or deadly weapon.

(b) It is not necessary that the accomplices have been convicted for an increased punishment (or enhanced penalty) to apply under subsection (a)(4) of this section.

(c) No person who stands convicted of an offense under this subchapter shall be sentenced to increased punishment (or enhanced penalty) by reason of the aggravating factors set forth in subsection (a) of this section, unless prior to trial or before entry of a plea of guilty, the United States Attorney or the Corporation Counsel, as the case may be, files an information with the clerk of the court, and serves a copy of such information on the person or counsel for the person, stating in writing the aggravating factors to be relied upon. (May 23, 1995, D.C. Law 10-257, § 219, 42 DCR 53; _____, 1996, D.C. Law 11- (Act 11-198), § 6(c), 43 DCR 528.)

Effect of amendments. — D.C. Law 11- (Act 11-198) validated a previously made change in the introductory language of (a).

Legislative history of Law 10-257. — See note to § 22-4101.

Legislative history of Law 11- (Act 11-198). — See note to § 22-4113.

Evidence establishing use of a dangerous weapon. — Victim's testimony about defendant's use of hot iron that resulted in serious

burns to her chest and abdomen showed defendant had established the iron as a dangerous weapon before the rape, and the government satisfied its burden of proving the "armed" element by demonstrating that the coercive element of the sexual assault arose directly from defendant's use of a dangerous weapon: the iron. *Johnson v. United States*, App. D.C., 613 A.2d 888 (1992).

Subchapter III. Admission of Evidence in Sexual Abuse Offense Cases.

§ 22-4121. Reputation or opinion evidence of victim's past sexual behavior inadmissible.

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under subchapter II of this chapter, reputation or opinion evidence of the past sexual behavior of an alleged victim of such offense is not admissible.

(b) For the purposes of this subchapter, "past sexual behavior" means sexual behavior other than the sexual behavior with respect to which an offense under subchapter II of this chapter is alleged. (May 23, 1995, D.C. Law 10-257, § 301, 42 DCR 53.)

Legislative history of Law 10-257. — See note to § 22-4101.

Inadmissible evidence. — In a rape prosecution, proffered testimony pertaining to the prosecutrix' reputation for unchastity is properly excluded. *McLean v. United States*, App. D.C., 377 A.2d 74 (1977); *Brewer v. United States*, App. D.C., 559 A.2d 317 (1989), cert. denied, 493 U.S. 1092, 110 S. Ct. 1163, 107 L. Ed. 2d 1066 (1990).

Complainant's reputation for unchastity and agitation irrelevant. — Testimony in a prosecution for taking indecent liberties with a minor that the complainant had a reputation both for unchastity and as an agitator is irrelevant. *Springs v. United States*, App. D.C., 311 A.2d 499 (1973).

§ 22-4122. Admissibility of other evidence of victim's past sexual behavior.

(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under subchapter II of this chapter, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is:

(1) Admitted in accordance with subsection (b) of this section and is constitutionally required to be admitted; or

(2) Admitted in accordance with subsection (b) of this section and is evidence of:

(A) Past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or bodily injury; or

(B) Past sexual behavior with the accused where consent of the alleged victim is at issue and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which such offense is alleged.

(b)(1) If the person accused of committing an offense under subchapter II of this chapter intends to offer under subsection (a) of this section, evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than 15 days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph, and the accompanying offer of proof, shall be filed under seal and served on all other parties and on the alleged victim.

(2) The motion described in paragraph (1) of this subsection shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subsection (a) of this section, the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing, the parties may call witnesses, including the alleged victim, and offer relevant evidence. If the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers, or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

(3) If the court determines on the basis of the hearing described in paragraph (2) of this subsection that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined. (May 23, 1995, D.C. Law 10-257, § 302, 42 DCR 53.)

Legislative history of Law 10-257. — See note to § 22-4101.

Admissible evidence. — A prosecuting witness in a case of rape may testify as to whether or not she made the complaint, and, if she did, when and to whom. *Lyles v. United States*, 20 App. D.C. 559 (1902); *Roney v. United States*, 43 App. D.C. 533 (1915); *Harris v. United States*, 269 F. 481 (D.C. Cir. 1920).

In a prosecution for statutory rape the testimony of similar acts prior to the offense charged in the indictment is admissible. *Weaver v. United States*, 299 F. 893 (D.C. Cir. 1924).

On a charge of carnal knowledge, evidence of the subsequent marriage of the parties is admissible. *Weaver v. United States*, 299 F. 893 (D.C. Cir. 1924).

In a prosecution for a sex offense, evidence of prior acts between the same parties is admissible as showing a disposition to commit the act charged. *Bracey v. United States*, 142 F.2d 85 (D.C. Cir.), cert. denied, 322 U.S. 762, 64 S. Ct. 1274, 88 L. Ed. 1589 (1944).

In a prosecution for carnally knowing a female child, allowing the child to testify that the defendant abused her similarly on previous occasions is proper where there is independent evidence which points to the defendant as having committed the offense charged. *Crawford v. United States*, 198 F.2d 976 (D.C. Cir. 1952).

In a prosecution for carnally knowing a female child, where the defendant initiates an inquiry into the child's statement to cast doubt upon his identity as the assailant, the interest of justice will not require a reversal because of

the admission, without objection, of another statement by the child on the same subject. *Crawford v. United States*, 198 F.2d 976 (D.C. Cir. 1952).

In a rape prosecution, evidence of specific acts of sexual intercourse with the defendant should be admitted where either there may be an issue of identity or to rebut the government's evidence that the prosecutrix did not consent to sexual intercourse on that particular occasion. *McLean v. United States*, App. D.C., 377 A.2d 74 (1977).

In prosecutions for sexual offenses, evidence of a history of sexual abuse of the complainant by the defendant may be admissible on the theory of predisposition to gratify special desires with that particular victim. *United States v. Huff*, 442 F.2d 885 (D.C. Cir. 1971); *Pounds v. United States*, App. D.C., 529 A.2d 791 (1987).

Defense witnesses may assert privilege against self-incrimination. — Potential defense witnesses may assert their privilege against self-incrimination with respect to their alleged independent sexual experiences with the complainant. In *re J.W.Y.*, App. D.C., 363 A.2d 674 (1976).

Defense allowed to cross-examine complainant concerning previous sexual ex-

perience. — In a proceeding where a juvenile is charged with aiding and abetting the act of carnal knowledge of a girl, the defense counsel is allowed to cross-examine the complainant concerning her previous sexual experience. In *re J.W.Y.*, App. D.C., 363 A.2d 674 (1976).

Limitation on cross-examination of witness held violation of defendant's right of confrontation. — Trial court's refusal to allow cross-examination of primary government witness regarding her prior false accusations of sexual activity against various family members violated defendant's Sixth Amendment right of confrontation and required reversal of convictions under this section and under former § 22-3501, concerning indecent acts with children. *Lawrence v. United States*, App. D.C., 482 A.2d 374 (1984).

Subsequent misconduct of prosecutrix inadmissible unless proof of previous unchastity. The subsequent misconduct of the prosecutrix with others is inadmissible unless, perhaps, when improper relations with others follow closely upon the commission of the offense by the accused, and are preceded by proof of circumstances tending to show that the prosecutrix has not been previously chaste. *Bray v. United States*, 39 App. D.C. 600 (1913).

§ 22-4123. Prompt reporting.

Evidence of delay in reporting an offense under subchapter II of this chapter to a public authority shall not raise any presumption concerning the credibility or veracity of a charge under subchapter II of this chapter. (May 23, 1995, D.C. Law 10-257, § 303, 42 DCR 53.)

Legislative history of Law 10-257. — See note to § 22-4101.

§ 22-4124. Spousal privilege inapplicable.

Laws attaching a privilege against disclosure of communications between a husband and wife are inapplicable in prosecutions under subchapter II of this chapter where the defendant is or was married to the victim or where the victim is a child. (May 23, 1995, D.C. Law 10-257, § 304, 42 DCR 53.)

Legislative history of Law 10-257. — See note to § 22-4101.

TITLE 23. CRIMINAL PROCEDURE.

Chapter

- 1. General Provisions..... §§ 23-101 to 23-114.
- 3. Indictments and Informations..... §§ 23-301 to 23-324.
- 5. Warrants and Arrests..... §§ 23-501 to 23-591.
- 7. Extradition and Fugitives from Justice..... §§ 23-701 to 23-707.
- 9. Fresh Pursuit..... §§ 23-901 to 23-903.
- 11. Professional Bondsmen..... §§ 23-1101 to 23-1112.
- 13. Bail Agency [Pretrial Services Agency] and
 Pretrial Detention..... §§ 23-1301 to 23-1333.
- 15. Out-of-State Witnesses..... §§ 23-1501 to 23-1504.
- 17. Death Penalty..... [Repealed].

CHAPTER 1. GENERAL PROVISIONS.

Sec.	Sec.
23-101. Conduct of prosecutions.	23-108. Depositions.
23-102. Abandonment of prosecution; enlargement of time for taking action.	23-109. Powers of investigators assigned to United States Attorney.
23-103. Statements prior to sentence.	23-110. Remedies on motion attacking sentence.
23-103a. Rights of victims of crime.	23-111. Proceedings to establish previous convictions.
23-104. Appeals by United States and District of Columbia.	23-112. Consecutive and concurrent sentences.
23-105. Challenges to jurors.	23-113. Limitations on actions for criminal violations.
23-106. Witnesses for defense; fees.	23-114. Corroboration of a child witness' testimony not required.
23-107. Discharge or acquittal of joint defendant during trial in order to be witness.	

§ 23-101. Conduct of prosecutions.

(a) Prosecutions for violations of all police or municipal ordinances or regulations and for violations of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia by the Corporation Counsel for the District of Columbia or his assistants, except as otherwise provided in such ordinance, regulation, or statute, or in this section.

(b) Prosecutions for violations of section 6 of the Act of July 29, 1892 (D.C. Code, sec. 22-1107), relating to disorderly conduct, and for violations of section 9 of that Act (D.C. Code, sec. 22-1112), relating to lewd, indecent, or obscene acts, shall be conducted in the name of the District of Columbia by the Corporation Counsel or his assistants.

(c) All other criminal prosecutions shall be conducted in the name of the United States by the United States attorney for the District of Columbia or his assistants, except as otherwise provided by law.

(d) An indictment or information brought in the name of the United States may include, in addition to offenses prosecutable by the United States, offenses prosecutable by the District of Columbia, and such prosecution may be conducted either solely by the Corporation Counsel or his assistants or solely by the United States attorney or his assistants if the other prosecuting authority consents.

(e) Separate indictments or informations, or both, charging offenses prosecutable by the District of Columbia and by the United States may be joined for trial if the offenses charged therein could have been joined in the same indictment. Such prosecution may be conducted either solely by the Corporation Counsel or his assistants or solely by the United States attorney or his assistants if the other prosecuting authority consents.

(f) If in any case any question shall arise as to whether, under this section, the prosecution should be conducted by the Corporation Counsel or by the United States attorney, the presiding judge shall forthwith, either on his own motion or upon suggestion of the Corporation Counsel or the United States attorney, certify the case to the District of Columbia Court of Appeals, which court shall hear and determine the question in a summary way. In every such

case the defendant or defendants shall have the right to be heard in the District of Columbia Court of Appeals. The decision of such court shall be final. (July 29, 1970, 84 Stat. 604, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-101.)

Cross references. — As to duties of Corporation Counsel, see § 1-361.

As to representation of indigents, see §§ 1-2702 and 11-2601.

As to prosecutions for violations of funeral services, see § 2-2818.

As to prosecution of violations of Medicaid Provider Fraud Prevention Act, see § 3-704.

As to penalties for violations of hazardous waste management provisions, see § 6-711.

As to penalties and prosecutions for violation of water pollution control provisions, see § 6-936.

As to penalties and prosecutions under wastewater control law, see § 6-964.

As to penalties and enforcement of adult protective services, see § 6-2512.

As to penalties for violations of alcoholic beverages provisions, see § 25-132.

As to prosecutions for violations of cable television provisions, see § 43-1849.

As to penalties for unlawful conduct on public passenger vehicles, see § 44-226.

As to prosecutions for violations of provisions governing insurance companies, see § 47-2605.

Free Flow of Information Act of 1992. — See §§ 16-4701 to 16-4704.

Violations against single sovereign. — Violations of the District of Columbia Code and 2 violations of the United States Code are all crimes against a single sovereign, namely, the United States. *Goode v. Markley*, 603 F.2d 973 (D.C. Cir. 1979), cert. denied, 444 U.S. 1083, 100 S. Ct. 1039, 62 L. Ed. 2d 768 (1980).

Prosecutions maintained in name of United States. — This section provides that all crimes prosecuted under the District of Columbia Code are maintained in the name of the United States. *Goode v. Markley*, 603 F.2d 973 (D.C. Cir. 1979), cert. denied, 444 U.S. 1083, 100 S. Ct. 1039, 62 L. Ed. 2d 768 (1980).

In the District of Columbia, all felony violations of the District of Columbia Code are conducted in the name of the United States by the United States Attorney for the District of Columbia, or by his or her assistants. *Stratmon v. United States*, App. D.C., 631 A.2d 1177 (1993).

Subsection (a) is in harmony with §§ 1-315(a), 1-319 and 1-361. District of Columbia v. Smith, App. D.C., 329 A.2d 128 (1974).

And it gives prosecutorial authority to the Corporation Counsel as to all municipal ordinances and regulations, irrespective of the prescribed punishment. District of Columbia v. Smith, App. D.C., 329 A.2d 128 (1974).

Formal consent of Corporation Counsel not required for U.S. Attorney to prosecute firearms violations. — A 1972 letter from the Corporation Counsel granting standing permission for the United States Attorney to prosecute violations of police regulations prohibiting possession of unregistered firearms and possession of ammunition therefor if such charges accompany a charge of violating § 22-3204, constitutes sufficient compliance with subsection (d) of this section such that the Corporation Counsel is not required in each case to give formal consent on the record for the United States Attorney to prosecute. *Copening v. United States*, App. D.C., 353 A.2d 305 (1976).

Joinder of federal offenses with D.C. offenses. — Where the District of Columbia regulatory offenses were joined with federal offenses in the indictment, and the D.C. Corporation Counsel consented to defendant's prosecution in district court, subsection (d) was satisfied. *United States v. Johnson*, 46 F.3d 1166 (D.C. Cir. 1995).

Role of U.S. Attorney in contempt proceeding against an attorney is irrelevant to court's jurisdiction. — Even assuming that this section prescribed a prosecutorial role for the United States Attorney in a contempt proceeding against an attorney, that fact would only raise a procedural question without effect upon the court's jurisdiction over the matter. In re Marshall, App. D.C., 467 A.2d 979 (1983).

Disorderly conduct in federal buildings or grounds. The United States, through the United States Attorney, and not the District of Columbia, through the Corporation Counsel, is the proper prosecutive authority for alleged disorderly and unlawful conduct in or about public buildings and grounds belonging to the United States within the District. *District of Columbia v. Ackerman*, App. D.C., 283 A.2d 24 (1971).

Prosecution for tampering with a parked vehicle. — The Corporation Counsel, rather than the United States Attorney, was the appropriate authority for prosecution for tampering with a parked vehicle in violation of the police regulations of the District. *District of Columbia v. Smith*, App. D.C., 329 A.2d 128 (1974).

Question of prosecutorial authority not properly certifiable. — Where a juvenile charged with an act of delinquency is not involved in a criminal prosecution, the question of prosecutorial authority is not one properly

certifiable pursuant to subsection (f) of this section. In re M.W.F., App. D.C., 312 A.2d 302 (1973).

Intervention concerning pretrial detention. — The District of Columbia lacks standing to intervene in a criminal case on the defendant's behalf concerning pretrial detention after an alleged violation of the Uniform

Controlled Substances Act. United States v. Sweetney, 113 WLR 2517 (Super. Ct.).

Cited in In re Kossow, App. D.C., 393 A.2d 97 (1978); United States v. Bailey, App. D.C., 495 A.2d 756 (1985); Pitts v. Thornburgh, 866 F.2d 1450 (D.C. Cir. 1989); Scott v. United States, App. D.C., 559 A.2d 745 (1989).

§ 23-102. Abandonment of prosecution; enlargement of time for taking action.

If any person charged with a criminal offense shall have been committed or held to bail to await the action of the grand jury and within nine months thereafter the grand jury shall not have taken action on the case, either by ignoring the charge or by returning an indictment, the prosecution of such charge shall be deemed to have been abandoned and the accused shall be set free or his bail discharged, as the case may be: but, the court having jurisdiction to try the offense for which the person has been committed, when practicable and upon good cause shown in writing and upon due notice to the accused, may from time to time enlarge the time for the taking action in such case by the grand jury. (July 29, 1970, 84 Stat. 605, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-102.)

Cross references. — As to abandonment of prosecution, see Superior Court Criminal Rule 48(c) in Volume 1 of the District of Columbia Court Rules Annotated.

"Held to bail" construed. — "Held to bail" apparently signifies not the status of being held without bail or in the absence of the ability to make bond, but rather of being released after posting a money bond. United States v. Goldston, 118 WLR 1013 (Super. Ct. 1990).

Indictment following release pursuant to this section. — When a defendant entitled to or actually granted relief pursuant to this section is thereafter indicted, his liberty cannot be restricted to the extent authorized by § 23-1325(a), unless, following a de novo hearing, the court finds that the defendant would either fail to appear at future court proceedings or could pose a danger to the community if released. Price v. United States, App. D.C., 476 A.2d 644 (1984).

Nine-month statutory period began with detention at presentment. — The running of the 9-month period embodied in this section and in Super. Ct. Crim. Rule 48(c) started when defendant was detained at his presentment, not when finding of probable cause was made at his preliminary hearing. Price v. United States, App. D.C., 476 A.2d 644 (1984).

Statutory period tolled by flight. — The provisions of this section and Super. Ct. Crim. Rule 48(c) requiring the release of a defendant held in custody, or placed on conditions of release, and not indicted within nine months of presentment, are tolled for any preindictment period during which defendant is a fugitive. United States v. Goldston, 118 WLR 1013 (Super. Ct. 1990).

§ 23-103. Statements prior to sentence.

(a) Except as provided in subsection (b) of this section, before imposing sentence the court may disclose to the defendant's counsel and to the prosecuting attorney, but not to one and not the other, all or part of any pre-sentencing report submitted to the court in the case. The court also prior to imposing sentence shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information

in mitigation of punishment. At any time when the defendant or his counsel addresses the court on the sentence to be imposed, the prosecuting attorney shall, if he wishes, have an equivalent opportunity to address the court and to make a recommendation to the court on the sentence to be imposed and to present information in support of his recommendation. Such information as the defendant or his counsel or the prosecuting attorney may present shall at all times be subject to the applicable rules of mutual discovery.

(b) When a victim elects to file a victim impact statement pursuant to § 23-103a, the court shall disclose the victim impact statement portion of the presentence report at a reasonable time prior to imposing sentence to the defendant's counsel and to the prosecuting attorney. (July 29, 1970, 84 Stat. 605, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-103; May 10, 1989, D.C. Law 7-229, § 2(a), 35 DCR 6155.)

Cross references. — As to alien sentencing, see § 16-713.

Legislative history of Law 7-229. — See note to § 23-103a.

Third sentence of section was intended to prohibit ex parte representations by defense counsel to the trial judge concerning sentencing. *Quarles v. United States*, App. D.C., 349 A.2d 690 (1975), cert. denied, 425 U.S. 972, 96 S. Ct. 2169, 48 L. Ed. 2d 795 (1976).

Government may allocute even if defendant makes no statement. — This section does not prohibit the government from allocuting with regard to sentencing even if the defendant chooses not to make a statement. *Quarles v. United States*, App. D.C., 349 A.2d 690 (1975), cert. denied, 425 U.S. 972, 96 S. Ct. 2169, 48 L. Ed. 2d 795 (1976).

Waiver of allocution not extended to post-sentencing hearing. — Where the government had agreed with the defendant not to allocute at the time of sentence in return for his guilty plea, the government was not barred thereafter to remain silent at the hearing on defendant's motion to reduce sentence. *Braxton v. United States*, App. D.C., 328 A.2d 385 (1974).

Cited in *Grant v. United States*, App. D.C., 509 A.2d 1147 (1986); *Fletcher v. United States*, App. D.C., 524 A.2d 40 (1987); *Fields v. United States*, App. D.C., 547 A.2d 138 (1988); *Warrick v. United States*, App. D.C., 551 A.2d 1332 (1988); *Johnson v. United States*, App. D.C., 597 A.2d 917 (1991); *United States v. Williams*, 121 WLR 2125 (Super. Ct. 1993).

§ 23-103a. Rights of victims of crime.

(a) For the purposes of this section, the term:

(1) "Court" means Superior Court of the District of Columbia.

(2) "Crime of violence" means any of the following or an attempt to commit any of the following offenses: assault, forcible sodomy, kidnapping, maliciously disfiguring another, manslaughter, murder, rape, robbery, aggravated assault, or sodomy of a child less than 16 years of age.

(3)(A) "Victim of a crime of violence" means any person who is killed or physically injured in the District of Columbia:

(i) As a result of a crime of violence;

(ii) While assisting lawfully to apprehend a person reasonably suspected of having committed or attempted a crime of violence;

(iii) While assisting a person against whom a crime of violence has been committed or attempted if the assistance was rendered in a reasonable manner; or

(iv) While attempting to prevent the commission of a crime of violence.

(B) The term "victim of a crime of violence" shall not include any person who committed or aided in the commission of the crime of violence or who was injured or killed as an indirect result of his or her participation in an unlawful and criminal activity.

(b)(1) Each victim of any crime of violence, or 1 representative from the immediate family of the victim if the victim has died, shall have the right:

(A) To be present at the defendant's trial, sentencing and parole hearings, provided that the appearance will not prejudice the victim's or family member's ability to testify at the trial if the victim or family member is a witness for the prosecution or defense;

(B) To submit, prior to the imposition of sentence, a written victim impact statement containing information concerning any emotional, psychological, financial, or physical harm done to or loss suffered by the victim; and

(C) To offer at the defendant's parole hearings, a written statement of the victim's opinion whether the defendant should be granted parole.

(2) In determining the appropriate sentence to be imposed on the defendant, the court shall consider any victim impact statement submitted under paragraph (1)(B) of this subsection.

(3) Each victim impact statement submitted under paragraph (1)(B) of this subsection shall be made a part of the presentence report filed by the probation division of the court.

(c) Each victim of a crime of violence, or a representative of the immediate family of the victim if the victim has died, shall be notified pursuant to court rule of the right to file a victim impact statement. (May 10, 1989, D.C. Law 7-229, § 2(b), 35 DCR 6155; Aug. 20, 1994, D.C. Law 10-151, §§ 101(f), 501, 41 DCR 2608.)

Section references. — This section is referred to in § 23-103.

Effect of amendments. — D.C. Law 10-151 inserted "aggravated assault" in (a)(2); rewrote (b); and rewrote the section heading preceding the text of the section.

Emergency act amendments. — For temporary amendment of section, see §§ 101(f) and 501 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 7-229. — Law 7-229, the "Victim's Rights Amendment Act of 1988," was introduced in Council and assigned Bill No. 7-586, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on June 28, 1988, and July 12, 1988, respectively. Signed by the Mayor on August 1, 1988, it was assigned Act No. 7-236 and transmitted to both Houses of Congress for its review.

Legislative history of Law 10-151. — Law 10-151, the "Omnibus Criminal Justice Reform Amendment Act of 1994," was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings

on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

Judicial discretion in type and quantity of information reviewed. — A trial court is required to consider at least one victim impact statement, filed in the manner prescribed by statute, concerning the emotional, psychological, financial, or physical harm done to or suffered by a victim or a deceased victim's immediate family, but this does not limit the type and quantity of information a trial court may, in its discretion, review in determining an appropriate sentence. *Collins v. United States*, App. D.C., 631 A.2d 48 (1993).

Verification of statements not required. — Neither the Victims Rights Amendment Act nor Super. Ct. Crim. Rule 32(a) requires verification of victim impact statements, and the trial court has broad discretion to review relevant matter, verified or not, within constitutional limits. *Collins v. United States*, App. D.C., 631 A.2d 48 (1993).

Contents of statements held not inflammatory. — The contents of the correspondence

reviewed by the trial court, including opinions concerning appellant's character, the sentence he should receive, the victim's funeral program, and four crayon drawings composed by his daughter, were not inflammatory or beyond the

scope permitted where most of the letters simply related the effect of the victim's murder upon his family and friends. *Collins v. United States*, App. D.C., 631 A.2d 48 (1993).

§ 23-104. Appeals by United States and District of Columbia.

(a)(1) The United States or the District of Columbia may appeal an order, entered before the trial of a person charged with a criminal offense, which directs the return of seized property, suppresses evidence, or otherwise denies the prosecutor the use of evidence at trial, if the United States attorney or the Corporation Counsel conducting the prosecution for such violation certifies to the judge who granted such motion that the appeal is not taken for purpose of delay and the evidence is a substantial proof of the charge pending against the defendant.

(2) A motion for return of seized property or to suppress evidence shall be made before trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion.

(b) The United States or the District of Columbia may appeal a ruling made during the trial of a person charged with a criminal offense which suppresses or otherwise denies the prosecutor the use of evidence on the ground that it was invalidly obtained, if the United States attorney or the Corporation Counsel conducting the prosecution for such violation certifies to the judge who made the ruling that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of the charge being tried against the defendant. The trial court shall adjourn the trial until the appeal shall be resolved; except that, if the decision on appeal has not been rendered within the ninety-six-hour period following the adjournment of the trial, the trial shall resume on the next day of regular court business following the expiration of the ninety-six-hour period, and the appeal shall be deemed void and without effect.

(c) The United States or the District of Columbia may appeal an order dismissing an indictment or information or otherwise terminating a prosecution in favor of a defendant or defendants as to one or more counts thereof, except where there is an acquittal on the merits.

(d) The United States or the District of Columbia may appeal any other ruling made during the trial of a person charged with an offense which the United States attorney or the Corporation Counsel certifies as involving a substantial and recurring question of law which requires appellate resolution. Such an appeal may be taken only during the trial and only with leave of the court. The trial court shall adjourn the trial until the appeal shall be resolved; except that, if the decision on appeal has not been rendered within the ninety-six-hour period following the adjournment of the trial, the trial shall resume on the next day of regular court business following the expiration of the ninety-six-hour period, and the appeal shall be deemed void and without effect.

(e) Any appeal taken pursuant to this section either before or during trial shall be expedited. If an appeal is taken pursuant to subsection (b) or (d)

during trial, the appellate court shall hear argument on such appeal within forty-eight hours of the adjournment of the trial pursuant to that subsection shall dispense with any requirement of written briefs other than the supporting materials previously submitted to the trial court, shall render its decision within forty-eight hours of argument on appeal, and may dispense with the issuance of a written opinion in rendering its decision. Such appeal and decision shall not affect the right of the defendant, in a subsequent appeal from a judgment of conviction, to claim as error reversal by the trial court on remand of a ruling appealed from during trial.

(f) Pending the prosecution and determination of an appeal taken pursuant to this section, the defendant shall be detained or released in accordance with chapter 13 of this title. (July 29, 1970, 84 Stat. 606, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-104.)

- I. General Consideration.
- II. Pretrial Orders.
- III. Motions Required Before Trial.
- IV. Orders Terminating Prosecutions.

I. GENERAL CONSIDERATION.

Section references. — This section is referred to in § 11-721.

Language of this section must be literally construed; it does not encompass other orders which may have the practical effect of achieving a similar or identical result. *United States v. Jones*, App. D.C., 423 A.2d 193 (1980).

Standards on review. — Review must afford appellees all legitimate inferences from the testimony and uncontroverted facts of record, and the appellate court must accept the inferences drawn by the trial court as to the facts before it if they are supportable under any reasonable view of the evidence. *United States v. Covington*, App. D.C., 385 A.2d 164 (1978).

"Criminal offense" includes "delinquent act." — The words "charged with a criminal offense" as used in this section include the term "delinquent act." *District of Columbia v. M.E.H.*, App. D.C., 312 A.2d 561 (1973).

United States cannot appeal in criminal cases without express Congressional authorization. *United States v. Jones*, App. D.C., 423 A.2d 193 (1980).

Right to prosecution appeals is not favored and statutes permitting such appeals will be strictly construed against the right. *United States v. Jackson*, App. D.C., 441 A.2d 937 (1982).

Separate provisions of this section are to be read independently. *United States v. Jones*, App. D.C., 423 A.2d 193 (1980).

In weighing delay caused by pretrial government appeal, the court must attempt to distinguish between delay that could not have been avoided by efforts to expedite and

unreasonable delay resulting from the failure to expedite. Unavoidable delay should be considered neutral and, thus, counted against the government to roughly the same degree as delay caused by court backlog. Unreasonable delay caused by failure to expedite the appeal should be considered significant. *Graves v. United States*, App. D.C., 490 A.2d 1086 (1984), cert. denied, 474 U.S. 1064, 106 S. Ct. 814, 88 L. Ed. 2d 788 (1986).

Failure to expedite appeal. — Where the government did not offer an explanation for its failure to expedite two interlocutory appeals, which added an unnecessary delay to an already lengthy period of delay, the government, which has the burden, failed to show "convincingly," as it must, that the defendant had not been prejudiced by the delay. *Sell v. United States*, App. D.C., 525 A.2d 1017 (1987).

Time for filing appeal stated in order is binding on parties. — The courts have created the exception to the operation of D.C. Court of Appeals Rule 4 II(b)(4) (now see Rule 4(b)(4)) that where the trial judge clearly expresses an intention that a written order condition the time for filing an appeal, the condition is binding on the parties. *United States v. Nicks*, App. D.C., 427 A.2d 444 (1981).

Procedure where search and seizure is only issue in case. — Where pretrial motion to suppress has been denied and the only available issue in a possession of contraband case is search or seizure, the approved procedure is to stipulate the facts as alleged in the information and have the court render a verdict thereon in order to preserve Fourth Amendment issue on

appeal. *United States v. Allen*, App. D.C., 337 A.2d 512 (1975).

Void conviction did not entitle defendant to new suppression hearing. — The fact that defendant's conviction was void because of a failure to obtain his personal waiver of the right to trial by jury did not entitle defendant to another hearing on his pretrial motion to suppress. *Payne v. United States*, App. D.C., 292 A.2d 800 (1972).

New grounds for suppression discovered at trial. — Where, at the time motions to suppress were heard, the government was not obligated to provide defense counsel with certain police department forms, and these forms became available at trial, and their contents disclosed an inconsistency in a police officer's testimony which was crucial to his credibility and the validity of the seizure of evidence, the inconsistency constituted a new ground for suppression, and the trial judge should have entertained a renewed motion to suppress. *Wheeler v. United States*, App. D.C., 300 A.2d 713 (1973).

Trial court erred in determining sua sponte to rehear motion to suppress, which had been considered and denied before trial, where no newly discovered grounds were presented. *United States v. Allen*, App. D.C., 337 A.2d 512 (1975).

Government appeal regarding jury instructions is not authorized by subsection (a)(1) of this section, where the jury instruction is not so inseparable from the preclusion of certain testimony as to make it part and parcel of the court's suppression order. *United States v. Jackson*, App. D.C., 450 A.2d 419 (1982).

Subsection (e) applicable to interlocutory appeals taken during trial. — A close reading of subsection (e) makes clear that this section, in allowing challenges to interlocutory decisions, only applies to interlocutory appeals taken pursuant to subsection (b) or (d) during trial, and not those taken pursuant to subsection (a)(1), at the pretrial stage. *Minick v. United States*, App. D.C., 506 A.2d 1115, cert. denied, 479 U.S. 836, 107 S. Ct. 133, 93 L. Ed. 2d 76 (1986).

Cited in *Jones v. United States*, App. D.C., 282 A.2d 561 (1971); *United States v. Bynum*, App. D.C., 283 A.2d 649 (1971); *Young v. United States*, App. D.C., 284 A.2d 671 (1971); *United States v. Walker*, App. D.C., 294 A.2d 376 (1972); *United States v. Cousar*, App. D.C., 349 A.2d 454 (1975); *United States v. Warren*, App. D.C., 373 A.2d 874 (1977); *United States v. Childs*, App. D.C., 379 A.2d 1188 (1977); *United States v. Bolden*, App. D.C., 381 A.2d 624 (1977); *United States v. Lowery*, App. D.C., 382 A.2d 1007 (1977); *United States v. Pannell*, App. D.C., 383 A.2d 1078 (1978); *United States v. Davis*, App. D.C., 387 A.2d 1091 (1978); *United States v. Hamilton*, App. D.C., 390 A.2d

449 (1978); *District of Columbia v. Onley*, App. D.C., 399 A.2d 84 (1979); *District of Columbia v. M.E.K.*, App. D.C., 407 A.2d 655 (1979); *York v. District of Columbia*, App. D.C., 407 A.2d 695 (1979); *United States v. Alexander*, App. D.C., 428 A.2d 42 (1981); *Ball v. United States*, App. D.C., 429 A.2d 1353 (1981); *United States v. Jackson*, App. D.C., 430 A.2d 1380 (1981); *United States v. Allen*, App. D.C., 436 A.2d 1303 (1981); *United States v. Ward*, App. D.C., 438 A.2d 201 (1981); *United States v. Minick*, App. D.C., 455 A.2d 874, cert. denied, 464 U.S. 831, 104 S. Ct. 111, 78 L. Ed. 2d 112 (1983); *Leasure v. United States*, App. D.C., 458 A.2d 726 (1983); *District of Columbia v. Clark*, App. D.C., 468 A.2d 961 (1983); *United States v. Mosby*, App. D.C., 495 A.2d 304 (1985); *United States v. Rorie*, App. D.C., 518 A.2d 409 (1986); *Brown v. United States*, App. D.C., 518 A.2d 415 (1986), cert. denied, 485 U.S. 978, 108 S. Ct. 1274, 99 L. Ed. 2d 485 (1988); *United States v. Wall*, App. D.C., 521 A.2d 1140 (1987); *Warrick v. United States*, App. D.C., 528 A.2d 438 (1987); *United States v. Johnson*, App. D.C., 540 A.2d 1090 (1988); *Beatty v. United States*, App. D.C., 544 A.2d 699 (1988); *Mills v. United States*, App. D.C., 566 A.2d 1073 (1989); *United States v. Rothmeier*, App. D.C., 570 A.2d 811 (1990); *In re F.G.*, App. D.C., 576 A.2d 724 (1990); *United States v. Porter*, App. D.C., 618 A.2d 629 (1992); *United States v. Bellamy*, App. D.C., 619 A.2d 515 (1993); *United States v. Harris*, App. D.C., 629 A.2d 481 (1993); *United States v. Montgomery*, 123 WLR 1993 (Super. Ct. 1995).

II. PRETRIAL ORDERS.

Objective of subsection (a)(1) is to accord conclusiveness at the trial level to pretrial rulings on motions to suppress by equating such rulings with final orders for purposes of appeal. *United States v. Dockery*, App. D.C., 294 A.2d 158 (1972).

Decision of pretrial motion to suppress becomes law of the case. — When a pretrial motion to suppress has been heard and decided, that decision becomes the law of the case. *Jenkins v. United States*, App. D.C., 284 A.2d 460 (1971); *Wheeler v. United States*, App. D.C., 300 A.2d 713 (1973).

And, unless appealed, is binding on trial judge. — Unless appealed, the disposition of a pretrial motion would seem necessarily binding on the trial judge should the motion be renewed subsequently. *United States v. Dockery*, App. D.C., 294 A.2d 158 (1972).

Prosecution has right to appeal any pretrial exclusion ruling whether based on alleged constitutional violations or other grounds. *United States v. Jackson*, App. D.C., 441 A.2d 937 (1982).

Government may appeal pretrial evidentiary decisions involving both exclusion-

ary and nonexclusionary rule issues. *District of Columbia v. McConnell*, App. D.C., 464 A.2d 126 (1983).

The government may appeal any pretrial evidentiary ruling excluding or suppressing evidence, provided that the terms of subsection (a)(1) of this section are met. *District of Columbia v. McConnell*, App. D.C., 464 A.2d 126 (1983).

Decision denying use of evidence of refusal to submit to breathalyzer test falls within the ambit of subsection (a)(1) of this section. *District of Columbia v. McConnell*, App. D.C., 464 A.2d 126 (1983).

Pretrial government appeal time as factor when defendant claims unconstitutional delay. — Pretrial government appeal time, whether short or long, will generally be a factor against the government when a defendant claims an unconstitutional pretrial delay unless the prosecutor moves to expedite the appeal under the authority of subsection (e). *Day v. United States*, App. D.C., 390 A.2d 957 (1978), rev'd on other grounds sub nom. *Graves v. United States*, App. D.C., 490 A.2d 1086 (1984).

Requirements of Rule 111 of the Superior Court Rules of Criminal Procedure become subordinate to the statutory right of appeal during the time when an appeal may be noted. *United States v. Oliver*, App. D.C., 297 A.2d 778 (1972).

Jurisdiction to hear appeal not defeated by dismissal. — Dismissal of information for want of prosecution, following denial of the government's request for a continuance to appeal from a suppression order because of a failure to comply with Rule 111 of the Superior Court Rules of Criminal Procedure, could not be entered to defeat the jurisdiction of the appellate court on a timely appeal taken pursuant to subsection (a)(1). *United States v. Oliver*, App. D.C., 297 A.2d 778 (1972).

Ruling on admissibility is advisory and not appealable. — Where, prior to trial, the court ruled that evidence of one offense would not be admissible in the trial of another offense to show a common scheme or plan, the trial court had merely expressed an advisory opinion on admissibility of the evidence, and the ruling was not appealable. *United States v. Shields*, App. D.C., 366 A.2d 454 (1976).

And is distinguishable from decision on suppression motion. — A pretrial ruling by the trial court that evidence of one offense would not be admissible in the trial of another offense to show a common scheme or plan does not have the same binding, law-of-the-case effect at a subsequent trial as a decision on a motion to suppress. *United States v. Shields*, App. D.C., 366 A.2d 454 (1976).

Appeal of suppression order in juvenile delinquency proceeding. — The District of

Columbia had the right to appeal an order of the Family Division of the Superior Court, entered at the prehearing stage of juvenile delinquency proceeding, suppressing as evidence unregistered pistol and suppressing certain statements made by subject child prior to his arrest. *District of Columbia v. M.E.H.*, App. D.C., 312 A.2d 561 (1973).

Period of appeal in juvenile delinquency proceeding. — The filing of the government's appeal from an order suppressing the confessions of an allegedly delinquent juvenile was required within the 10-day period provided for appeals in criminal cases rather than the 30-day period for appeals of civil cases. *District of Columbia v. M.A.C.*, App. D.C., 328 A.2d 375 (1974).

Court's failure to determine all of suppression motion. — The court's grant of that portion of a suppression motion which related to property not covered by a warrant, while deferring decision on the question of validity of warrant because criminal prosecution had not yet been instituted, was improper and the court should have determined all of motion. *United States v. Farmer*, App. D.C., 297 A.2d 783 (1972).

III. MOTIONS REQUIRED BEFORE TRIAL.

Subsection (a)(2) is intended to further restrict the manner in which search and seizure issues can be raised. *Young v. United States*, App. D.C., 284 A.2d 671 (1971).

Motions to suppress must be made prior to trial under this section unless a defendant can show good cause for failure to do so. *Duddles v. United States*, App. D.C., 399 A.2d 59 (1979).

Where defendant did not move to suppress tangible evidence before trial, and neither exception for such failure under subsection (a)(2) was applicable, defendant had waived the issue on appeal. *Simpson v. United States*, App. D.C., 576 A.2d 1336 (1990).

Where defendant did not move before trial to suppress handgun as evidence and alleged no good cause for his failure to do so, he waived the issue on appeal. *Streater v. United States*, App. D.C., 478 A.2d 1055 (1984).

And such motions should be heard during trial only in most exceptional cases. *Bailey v. United States*, App. D.C., 279 A.2d 508 (1971).

Exceptions to pretrial requirement. — This section provides 2 exceptions to the requirement of a pretrial motion, i.e., when a defendant can demonstrate that he did not have an opportunity to file a motion before trial, or that he was unaware of the grounds for the motion. *Duddles v. United States*, App. D.C., 399 A.2d 59 (1979).

Motions not required before trial. — Except for motions to suppress illegally obtained evidence, Congress has not mandated pretrial motions that would deny the prosecutor the use of evidence at trial. *Giles v. District of Columbia*, App. D.C., 548 A.2d 48 (1988).

"Nonsuppression" motions. — There is no statute or rule obligating a defendant to file a pretrial "nonsuppression" motion to exclude a chemist's report delivered before trial under § 33-556, although clearly there is no provision that would prevent a defendant from doing so or preclude the court from granting the motion and allowing the government to take a pretrial appeal under § 23-104(a)(1). *Giles v. District of Columbia*, App. D.C., 548 A.2d 48 (1988).

Court's refusal to hear motion filed at trial was within its discretion where defense counsel did not claim that motion was based upon newly learned information but acknowledged that belated effort to move to suppress was tactical response to nonappearance of 2 witnesses. *Anderson v. United States*, App. D.C., 326 A.2d 807 (1974), cert. denied, 420 U.S. 978, 95 S. Ct. 1405, 43 L. Ed. 2d 659 (1975).

Admission of evidence where no suppression motion made. — In view of the defendant's failure to move to suppress narcotics paraphernalia before trial, absent a showing of plain error, admission of the narcotics paraphernalia into evidence and denial of a motion for a judgment of acquittal of possession of narcotics paraphernalia were not errors. *Brown v. United States*, App. D.C., 289 A.2d 891 (1972).

Failure to make motion or objection at trial. — Where a defendant, charged with petit larceny, made no pretrial motion to suppress allegedly stolen notebooks which were introduced at trial without objection, any objection to evidence was waived by the defendant who claimed on appeal that the notebooks should have been suppressed as having been seized illegally. *Grennett v. United States*, App. D.C., 318 A.2d 589 (1974).

Defendant's contention that narcotics paraphernalia was obtained as a result of illegal search and seizure would not be considered on appeal where defendant had not moved to suppress paraphernalia, nor attempted to justify his failure to so move. *Brown v. United States*, App. D.C., 289 A.2d 891 (1972).

Delay due to government's failure to move court to expedite consideration of its interlocutory appeal was chargeable to government. — Because the government filed its notice of interlocutory appeal but failed to move the court to expedite consideration, the entire period, from the date the government gave notice it would appeal through the date of dismissal of the appeal, was chargeable to the government as a significant delay for purposes of determining whether the defendant had been

afforded a speedy trial. *Graves v. United States*, App. D.C., 467 A.2d 712 (1983).

IV. ORDERS TERMINATING PROSECUTIONS.

Dismissal of an information without prejudice is an appealable order. *United States v. Cummings*, App. D.C., 301 A.2d 229 (1973).

And possibility of new indictment did not render dismissal nonreviewable. — The fact that dismissal of an indictment without prejudice created no bar to seeking a new indictment did not render the dismissal order nonreviewable. *United States v. Hector*, App. D.C., 298 A.2d 504 (1972).

Court's refusal to reconsider dismissal of indictment not appealable order. — Trial court's refusal to reconsider its dismissal of the indictment in response to the government's motion is not an appealable order within the meaning of this section. *United States v. Jones*, App. D.C., 423 A.2d 193 (1980).

Appeal of dismissal where defendant subject to new trial. — Double jeopardy principles do not preclude a government appeal of the trial court's order dismissing an indictment where the defendant is subject to a new trial following a mistrial. *United States v. Harvey*, App. D.C., 377 A.2d 411 (1977), rev'd on other grounds, App. D.C., 392 A.2d 1049 (1978).

Jeopardy not attached. — Since the opening statement was not evidence, the trial court had not otherwise begun receiving evidence, and because no juror or witness was ever sworn, jeopardy had not attached when the trial court dismissed the charge after the opening statement by the prosecutor. *District of Columbia v. Whitley*, App. D.C., 640 A.2d 710 (1994).

Constitution bars appeal and retrial after dismissal for insufficient evidence. — The double jeopardy clause of the Fifth Amendment does not bar governmental appeal and retrial after a dismissal unless it was premised on some factual determination of the insufficiency of the evidence of the defendant's guilt. *Sedgwick v. Superior Court*, 584 F.2d 1044 (D.C. Cir. 1978), cert. denied, 439 U.S. 1075, 99 S. Ct. 849, 59 L. Ed. 2d 42 (1979).

But not appeal of directed verdict of not guilty by reason of insanity. — The double jeopardy clause does not bar government's appeal contending that trial judge committed reversible error in directing verdict of not guilty by reason of insanity following defendant's guilty plea, because, should the government prevail, the issue of insanity would be resubmitted to the jury, but no new trial would be required. *United States v. Tyler*, App. D.C., 376 A.2d 798 (1977).

Appeal and retrial proper where prosecution allegedly withheld exculpatory material. — A dismissal or mistrial ruling predicated on *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), and granted on defendant's motion is answerable to appellate review and does not bar retrial if the appellate court finds no *Brady* violation. *Sedgwick v. Superior Court*, 584 F.2d 1044 (D.C. Cir. 1978), cert. denied, 439 U.S. 1075, 99 S. Ct. 849, 59 L. Ed. 2d 42 (1979).

Or failed to inform court of potential jury contamination. — Prosecutorial misconduct in failing to inform the court of potential jury contamination prior to the impaneling and swearing of the jurors did not warrant erecting double jeopardy bar to retrial of defendant. *United States v. Harvey*, App. D.C., 392 A.2d 1049 (1978).

Where a suppression order, if lawful, would effectively terminate the prosecution, an oral continuance request by the government to permit an appeal from the suppression order did not justify a dismissal order based upon the government's failure to comply with Rule 111 of the Superior Court Rules of Criminal Procedure. *United States v. Oliver*, App. D.C., 297 A.2d 778 (1972).

Failure to comply with pretrial order terminated prosecution. — The trial court's order that the United States would not be permitted to call any person as a witness in a criminal case unless, with respect to that witness, the government had fully complied with a prior order to furnish the arrest and criminal

records of prosecution witnesses to defense counsel before trial is final and appealable where the government refused to comply with the order to produce and thus the order precluding the calling of the witnesses effectively terminated the prosecution. *United States v. Engram*, App. D.C., 337 A.2d 488 (1975), cert. denied, 423 U.S. 1058, 96 S. Ct. 793, 46 L. Ed. 2d 648 (1976).

Where underlying rationale for dismissal of information was an erroneous belief that the defendant would be incarcerated because of the government's appeal from a suppression order and a preoccupying disagreement with the government's announced determination to proceed with the appeal, the order of dismissal was without authority and void. *United States v. Oliver*, App. D.C., 297 A.2d 778 (1972).

Dismissal for want of prosecution erroneous where defendant did not show prejudice. — The motions judge erred in dismissing a prosecution with prejudice for want of prosecution after the arresting officer failed to appear at a hearing on the accused's motion to suppress, following dismissal of a prior prosecution for want of prosecution because of the officer's failure to appear at trial, where the accused made no proffer of evidence that he had been prejudiced by the delay and advanced no claim that he had been denied a speedy trial, and less than 1 year had elapsed between the date of arrest and the hearing on his motion to suppress. *United States v. Mack*, App. D.C., 298 A.2d 509 (1972).

§ 23-105. Challenges to jurors.

(a) In a trial for an offense punishable by death, each side is entitled to twenty peremptory challenges. In a trial for an offense punishable by imprisonment for more than one year, each side is entitled to ten peremptory challenges. In all other criminal cases, each side is entitled to three peremptory challenges. If there is more than one defendant, or if a case is prosecuted both by the United States and by the District of Columbia, the court may allow additional peremptory challenges and permit them to be exercised separately or jointly, but in no event shall one side be entitled to more peremptory challenges than the other.

(b) The court may direct that jurors in addition to the regular jury be called and impaneled to sit as alternate jurors. In addition to those otherwise allowed, each side is entitled to one peremptory challenge if one or two alternate jurors are to be impaneled, to two peremptory challenges if three or four alternate jurors are to be impaneled, and to three peremptory challenges if five or six alternate jurors are to be impaneled.

(c) Any juror or alternate juror may be challenged for cause.

(d) No verdict shall be set aside for any cause which might be alleged as ground for challenge of a juror before the jury is sworn, except when the

objection to the juror is that he had a bias against the defendant such as would have disqualified him, such disqualification was not known to or suspected by the defendant or his counsel before the juror was sworn, and the basis for such disqualification was the subject of examination or request for examination of the prospective jurors by or on request of the defendant. (July 29, 1970, 84 Stat. 607, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-105.)

Cross references. — As to qualifications of jurors, see § 11-1901.

As to challenges in civil cases, see § 11-1902.

Selection procedure denied defendant's rights. — A jury selection method, whereby no venireman was allowed into the box to replace a struck juror until each round had been completed, denied on the last round the defendant's right to reject jurors and hence violated defendant's statutory right to exercise 10 peremptory challenges, requiring reversal of conviction. *Butler v. United States*, App. D.C., 377 A.2d 54 (1977).

Manner of conducting voir dire relegated to sound discretion of trial court, and its decision will not be disturbed on appeal unless accused was denied full and unrestricted exercise of his right to make peremptory challenges. *Taylor v. United States*, App. D.C., 471 A.2d 999 (1983).

While trial court should apprise parties of rules which will govern jury selection prior to start of process, trial court did not unduly restrict defendant's use of peremptory challenges during voir dire when, after each side had used 7 of its 10 challenges, the court informed both sides that a pass would not count as a strike. *Taylor v. United States*, App. D.C., 471 A.2d 999 (1983).

Explaining peremptory challenges. — If the question whether a particular peremptory challenge was discriminatorily exercised is to

be resolved with any pretense of authority or accuracy, the amount of time and resources that will have to be devoted to the inquiry may be very substantial. To permit inquiry into the basis for a peremptory challenge tends to force the peremptory challenge to collapse into a challenge for cause. Although the prosecutor's explanation of a peremptory challenge need not rise to the level justifying a challenge for cause, some sort of explanation is required. *United States v. Cosby*, 115 WLR 721 (Super. Ct. 1987).

Departure from established challenging procedure produced unequal number of challenges. — Where the trial court announced that each side would have 3 peremptory challenges and that a pass would count as a challenge, and where, after the first 2 rounds of challenges and a trial court request that the government exercise its final challenge first, the prosecutor replied that the government was satisfied and defense counsel then exercised his last challenge, the trial court committed reversible error in departing from the procedure it had established to allow prosecutor to subsequently make another challenge, thus allowing government more challenges than the defense. *Armwood v. United States*, App. D.C., 373 A.2d 895 (1977).

Cited in *District of Columbia v. McConnell*, App. D.C., 464 A.2d 126 (1983); *Harlee v. District of Columbia*, App. D.C., 558 A.2d 351 (1989).

§ 23-106. Witnesses for defense; fees.

The court shall order at any time that a subpoena be issued for service upon a named witness on behalf of a defendant if the defendant makes an application for such an order and makes a satisfactory showing that he is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. If the court orders the subpoena to be issued the costs incurred by the process and the fees of the witness so subpoenaed shall be paid in the same manner in which similar costs and fees are paid in case of a witness subpoenaed in behalf of the prosecuting authority. (July 29, 1970, 84 Stat. 607, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-106.)

Cross references. — As to competency and credibility of witnesses who have been convicted of crime, see § 14-305.

Limitation on ordering personal testi-

mony of certain officers. — Cabinet members and chief administrative officials should not be called to testify personally unless a clear showing is made that such a proceeding is

essential to prevent prejudice or injustice to the party requesting the testimony. *Davis v. United States*, App. D.C., 390 A.2d 976 (1978).

§ 23-107. Discharge or acquittal of joint defendant during trial in order to be witness.

(a) When two or more persons are jointly indicted or charged by information, or charged by separate indictments or informations which have been joined for trial, the court may, with the consent of the prosecuting authority, direct that a defendant who has not gone into his defense be discharged so that he may be a witness for the prosecution.

(b) When two or more persons are jointly tried, a person desiring that another defendant testify on his behalf may request a judgment of acquittal on behalf of such defendant, which the court shall consider in the same manner as a motion made by such defendant.

(c) At the request of a defendant who wishes to testify on behalf of another person with whom he is jointly tried, if the evidence against such defendant is sufficient to be submitted to the jury and if such other person consents, the court may submit the case concerning such defendant to the jury separately so that his testimony may not be considered against him by such jury.

(d) A discharge granted pursuant to subsection (a), or an acquittal secured pursuant to subsection (b) or (c), shall be a bar to another prosecution for the same offense of the defendant so discharged or acquitted. (July 29, 1970, 84 Stat. 607, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-107.)

§ 23-108. Depositions.

(a) If a material witness for either the prosecution or the defendant resides more than twenty-five miles from the place of holding court, is sick or infirm, or is about to leave the District of Columbia, and the prosecution or the defendant applies in writing to the court for a commission to examine such witness, the court may grant the commission, and enter an order stating for what length of time notice shall be given to the other party before such witness shall be examined. At or before the time fixed in the notice, when the examination is upon written interrogatories, the other party may file cross-interrogatories. When the examination is conducted orally, the other party may cross-examine the deponent. If the other party fails to file written interrogatories or fails to attend an oral examination, the clerk shall file the following interrogatories:

“(1) Are all your statements in the foregoing answers made from your own personal knowledge? If not, show what is stated upon information and give its source.

“(2) State everything you know in addition to what is stated in your above answers concerning this case favorable to either the prosecution or the defendant.”

(b) The court may order in any case that the examination be conducted orally.

(c) The commission shall issue from the clerk's office, the examination of the witnesses shall be made and certified, and the return thereof made in the same

manner as in civil cases, and unimportant irregularities or errors in the proceedings under the commission shall not cause the deposition to be excluded where no substantial prejudice can be wrought to the prosecution or the defendant by such irregularities or errors.

(d) Copies of the depositions or answers to interrogatories shall be made available to all of the parties upon the completion of the examination. (July 29, 1970, 84 Stat. 608, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-108.)

Cross references. — As to depositions in civil cases, see § 14-104.

§ 23-109. Powers of investigators assigned to United States Attorney.

Any special investigator appointed by the Attorney General and assigned to the United States Attorney for the District shall have authority to execute all lawful writs, process, and orders issued under authority of the United States, and command all necessary assistance to execute his duties, and shall have the same powers to make arrests as are possessed by members of the Metropolitan Police Department of the District of Columbia. (July 29, 1970, 84 Stat. 608, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-109.)

§ 23-110. Remedies on motion attacking sentence.

(a) A prisoner in custody under sentence of the Superior Court claiming the right to be released upon the ground that (1) the sentence was imposed in violation of the Constitution of the United States or the laws of the District of Columbia, (2) the court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, (4) the sentence is otherwise subject to collateral attack, may move the court to vacate, set aside, or correct the sentence.

(b) A motion for such relief may be made at any time.

(c) Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting authority, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto. If the court finds that (1) the judgment was rendered without jurisdiction, (2) the sentence imposed was not authorized by law or is otherwise open to collateral attack, (3) there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner, resentence him, grant a new trial, or correct the sentence, as may appear appropriate.

(d) A court may entertain and determine the motion without requiring the production of the prisoner at the hearing.

(e) The court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

(f) An appeal may be taken to the District of Columbia Court of Appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(g) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained by the Superior Court or by any Federal or State court if it appears that the applicant has failed to make a motion for relief under this section or that the Superior Court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. (July 29, 1970, 84 Stat. 608, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-110.)

Cross references. — As to representation of indigents, see §§ 1-2702 and 11-2601.

Section references. — This section is referred to in § 11-2601.

Intent of Congress in enacting the District of Columbia Court Reform and Criminal Procedure Act of 1970 is to create largely independent local court system. *Bland v. Rodgers*, 332 F. Supp. 989 (D.D.C. 1971).

This section provides a procedure distinct from a direct appeal. *Brown v. United States*, App. D.C., 411 A.2d 631 (1980).

Section is substantially identical to 28 U.S.C. § 2255, and federal court interpretations of that section provide guidance in construing this section. *Butler v. United States*, App. D.C., 388 A.2d 883 (1978); *Gibson v. United States*, App. D.C., 388 A.2d 1214 (1978); *Pettaway v. United States*, App. D.C., 390 A.2d 981 (1978); *Williams v. United States*, App. D.C., 408 A.2d 996 (1979); *Lorimer v. United States*, App. D.C., 425 A.2d 1306 (1981); *United States v. Redwood*, 110 WLR 1485 (Super. Ct. 1982); *United States v. Hawkins*, 110 WLR 1577 (Super. Ct. 1982); *Neverdon v. District of Columbia*, App. D.C., 468 A.2d 974 (1983).

Section 2255 of Title 28, U.S.C., is nearly identical and functionally equivalent to this section. *Streater v. United States*, App. D.C., 429 A.2d 173 (1980), appeal dismissed and cert. denied, 451 U.S. 902, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981), *aff'd*, App. D.C., 478 A.2d 1055 (1984).

This section and the federal statute enabling federal prisoners to challenge their convictions are nearly identical in language, and functionally they are equivalent. *Garris v. Lindsay*, 794 F.2d 722 (D.C. Cir.), cert. denied, 479 U.S. 993, 107 S. Ct. 595, 93 L. Ed. 2d 595 (1986).

Strict principles of res judicata inapplicable to these proceedings. — Although at some point the limitation of subsection (e) on successive motions becomes applicable, strict principles of res judicata do not apply in proceedings under this section. *Pettaway v. United States*, App. D.C., 390 A.2d 981 (1978); *United States v. Hawkins*, 110 WLR 1577 (Super. Ct. 1982).

One primary purpose of this section is to enable convicted prisoners to escape the shackles of res judicata when constitutional rights have been violated or other illegalities have occurred in their sentencing. *Kirk v. United States*, App. D.C., 510 A.2d 499 (1986).

Under the plain language of subsection (e), a motion filed under this section was not a successive motion. *Junior v. United States*, App. D.C., 634 A.2d 411 (1993).

Applicability. — Pro se letter claiming ineffective assistance of counsel written subsequent to trial but prior to sentencing was properly treated as filed pursuant to Super. Ct. Crim. R. 33 rather than this section, which only authorizes a motion to vacate, set aside, or correct a sentence. *Newton v. United States*, App. D.C., 613 A.2d 332 (1992).

An ineffectiveness claim grounded on failure to assert Interstate Agreement on Detainers Act rights is subject to review on a writ of habeas corpus or motion pursuant to this section. *United States v. Jones*, 120 WLR 2441 (Super. Ct. 1992).

Federal equivalent. — This section is the functional equivalent of 28 U.S.C. § 2255. *Perkins v. Henderson*, 881 F. Supp. 55 (D.D.C. 1995); *Wilson v. Office of Chairperson, D.C. Bd. of Parole*, 892 F. Supp. 277 (D.D.C. 1995).

Section has no application in civil commitment context. *Benson v. Meredith*, 455 F. Supp. 662 (D.D.C. 1978).

But does apply in context of certain new trial motions. — If a convict pending appeal has moved the trial court for a new trial and asserted grounds in his motion that would be cognizable under this section, and the government's remedy upon vacation of the sentence would be a new trial, then that motion should be considered as a motion under this section. *Johnson v. United States*, App. D.C., 385 A.2d 742 (1978).

This section is not designed to be a substitute for direct review. *Fields v. United States*, App. D.C., 466 A.2d 822, cert. denied, 464 U.S. 998, 104 S. Ct. 497, 78 L. Ed. 2d 690 (1983); *Head v. United States*, App. D.C., 489 A.2d 450 (1985).

Relief is appropriate only for serious defects in the trial which were not correctible on direct appeal or which appellant was prevented by exceptional circumstances from raising on direct appeal. *Head v. United States*, App. D.C., 489 A.2d 450 (1985).

Federal post-conviction review prohibited. — The unique status of the District of Columbia precludes nearly all federal post-conviction review of District of Columbia Superior Court criminal convictions. *Perkins v. Henderson*, 881 F. Supp. 55 (D.D.C. 1995).

Fundamental defect must have resulted in miscarriage of justice. — Defendant assumes a heavy burden of proof when he seeks to vacate or set aside his sentence under this section: To prevail on collateral attack, he must show a fundamental defect which inherently results in a complete miscarriage of justice. *United States v. Miller*, 113 WLR 2237 (Super. Ct. 1985).

One of the purposes of collateral review under this section is to ensure that trial and appellate courts conduct their proceedings in conformity with established constitutional standards. *Fields v. United States*, App. D.C., 466 A.2d 822, cert. denied, 464 U.S. 998, 104 S. Ct. 497, 78 L. Ed. 2d 690 (1983).

Power of court. — A trial court has inherent power to correct its record so as to reflect the truth and ensure that justice be served. *Newton v. United States*, App. D.C., 613 A.2d 332 (1992).

Jurisdiction. — This section vests subject matter jurisdiction to entertain collateral attacks upon Superior Court sentences in that court. Thus, prisoners serving sentences imposed by the Superior Court must file motions challenging their sentences in that court; federal courts are generally without jurisdiction to entertain motions to vacate, set aside, or correct a sentence imposed by the District of Columbia Superior Court. *Wilson v. Office of Chairperson*, D.C. Bd. of Parole, 892 F. Supp. 277 (D.D.C. 1995).

Recusal of judge. — Affidavit of defense counsel alleging that trial judge harbored personal animosity toward defense counsel that adversely affected defendant's right to a fair and impartial trial was legally sufficient for judge to have recused himself. *Gillum v. United States*, App. D.C., 613 A.2d 366 (1992).

Standing issue. — Trial judge erred in denying a motion filed under this section without a hearing on the ground that defendant lacked standing to raise Fourth Amendment claims because he was not an overnight guest at the home where he was arrested. *Junior v. United States*, App. D.C., 634 A.2d 411 (1993).

Under the plain language of subsection (e), a motion filed under this section was not a successive motion. *Junior v. United States*, App. D.C., 634 A.2d 411 (1993).

Where a defendant's original sentence was illegal because it was inconsistent with the controlling sentencing statute and was thus a nullity, his resentencing was a de novo proceeding at which he was entitled to an opportunity to allocute. *Kerns v. United States*, App. D.C., 551 A.2d 1336 (1989).

Requisites for collateral attack. — Where a defendant has failed to raise an available challenge to his conviction on direct appeal, he may not raise that issue on collateral attack unless he shows both cause for his failure to do so and prejudice as a result of his failure. *Head v. United States*, App. D.C., 489 A.2d 450 (1985).

Application of constitutional standards. — Courts hearing collateral appeals need not apply all "new" constitutional rules retroactively; rather, courts need only apply the constitutional standards prevailing at the time the original proceeding took place. *Fields v. United States*, App. D.C., 466 A.2d 822, cert. denied, 464 U.S. 998, 104 S. Ct. 497, 78 L. Ed. 2d 690 (1983).

Section should not produce mechanical jurisprudence triggered merely by an artful allegation of facts dehors the record on appeal. *Gregg v. United States*, App. D.C., 395 A.2d 36 (1978); *Glass v. United States*, App. D.C., 395 A.2d 796 (1978).

Right to counsel. — Since neither the constitution nor any other law requires appointment of counsel for purposes of pursuing relief under this section, § 11-2602 makes clear that any appointment of counsel for that purpose is entrusted to the sound discretion of the trial court. *Jenkins v. United States*, App. D.C., 548 A.2d 102 (1988).

Because the request for counsel and a § 23-110 motion are part of the same package, the question in every case is not whether the denial of the request for counsel is appealable as a final order in its own right but whether it is appealable as a collateral order before entry of a final order on a motion under this section itself. *Jenkins v. United States*, App. D.C., 548 A.2d 102 (1988).

Where defendant has not provided any basis for a motion under this section, appointment of counsel is unwarranted. *Jenkins v. United States*, App. D.C., 548 A.2d 102 (1988).

Neither the constitution nor any statute requires the appointment of counsel for post-conviction proceedings; therefore, since defendant had no constitutional right to counsel for his § 23-110 motion, he could not prevail on a claim that his counsel was constitutionally ineffective in relation to that motion. *Lee v. United States*, App. D.C., 597 A.2d 1333 (1991).

When a hearing is required under this section, the appointment of counsel by the trial court is obligatory. *Doe v. United States*, App. D.C., 583 A.2d 670 (1990).

This section provides no basis upon which trial court may review appellate proceedings. *Streater v. United States*, App. D.C., 429 A.2d 173 (1980), cert. denied, 451 U.S. 902, 101 S. Ct. 1966, 68 L. Ed. 2d 289 (1981), aff'd, App. D.C., 478 A.2d 1055 (1984); *Streater v. Jackson*, 691 F.2d 1026 (D.C. Cir. 1982).

Noncompliance with formalities of criminal procedure rule is not collaterally reviewable unless the claimed error of law was a fundamental defect which inherently resulted in a complete miscarriage of justice. *Butler v. United States*, App. D.C., 388 A.2d 883 (1978).

Judicial immunity not waived by defendant's failure to comply. — Defendant's failure to avail himself of the remedy in this section in a timely fashion provides no basis for waiving judicial immunity for sentencing error. *McAllister v. District of Columbia*, App. D.C., 653 A.2d 849 (1995).

Court of Appeals affirmance of a trial court's rejection of a motion pursuant to this section does not trigger the start of a new 120-day filing period for the purposes of a motion under Rule 35(a) of the Superior Court Rules of Criminal Procedure. *Brown v. United States*, App. D.C., 411 A.2d 631 (1980).

Motion by federal inmate inappropriately treated as motion under this section. — Where federal inmate filed a pro se motion alleging disparate treatment in his parole eligibility from that of other violators convicted of the same offenses who are placed in penal institutions of the District of Columbia, it was inappropriately treated by the trial court as a motion to vacate or correct sentence under this section and should have been treated as a civil action challenging his classification as a prisoner under the jurisdiction of the United States Parole Board. *Cosgrove v. United States*, App. D.C., 411 A.2d 57 (1980).

Motion repeating contentions rejected in habeas corpus petition. — To extent that the allegations in a motion to vacate the sentence merely repeated contentions previously rejected in habeas corpus petition, they need not have been considered by trial court judge. *Hurt v. St. Elizabeths Hosp.*, App. D.C., 366 A.2d 780 (1976).

Where defendant contends that the trial court should have raised the issue of his sanity and competence to stand trial sua sponte, such contention should be advanced by a motion for new trial rather than on appeal. *Clyburn v. United States*, App. D.C., 381 A.2d 260 (1977), cert. denied, 435 U.S. 999, 98 S. Ct. 1656, 56 L. Ed. 2d 90 (1978).

Contention that erroneous information was given by the prosecution at sentencing would be an appropriate subject for a motion under subsection (a). *Terrell v. United States*, App. D.C., 294 A.2d 860 (1972), cert.

denied, 410 U.S. 938, 93 S. Ct. 1398, 35 L. Ed. 2d 603 (1973).

"Illegal" sentence may be challenged at any time. — Where a sentence is "illegal" in the sense that the court goes beyond its authority by acting without jurisdiction or imposing a sentence in excess of the statutory maximum provided, then such sentence — because of the gravity of the error, the unqualified deprivation of one's liberty — may be challenged at any time. *Robinson v. United States*, App. D.C., 454 A.2d 810 (1982).

Remand to correct sentence required despite absence of motion. — Where the United States Attorney wrote to the Chief Judge of the Superior Court and to defendant's counsel, pointing out that the length of sentence imposed on appellant for unlawful possession of a pistol was unauthorized because defendant had not previously been convicted of that offense, this required remanding the case to the trial court for further proceedings to correct the sentence despite the absence of a motion pursuant to subsection (a). *Smith v. United States*, App. D.C., 414 A.2d 1189 (1980).

Increase in sentence after service commenced invalid. — Where a court granted a prisoner's request that his sentence be modified to run concurrently with a previously imposed sentence, but 1 week later the court issued another order denying the prisoner's request, the latter order was invalid as a constitutionally prohibited increase in sentence after service had commenced. *United States v. Robinson*, App. D.C., 388 A.2d 469 (1978).

Limitations period applicable to challenge of sentence imposed in "illegal manner." — Where a court of competent jurisdiction imposes a sentence within the limits authorized by the relevant statute, but commits a procedural error in doing so, it is not an abuse of discretion nor unreasonable to characterize this sentence as one imposed in an "illegal manner" under Superior Court Criminal Rule 35(a) and therefore subject to the 120-day jurisdictional limitation for challenge. *Robinson v. United States*, App. D.C., 454 A.2d 810 (1982).

Defendant's pro se motion to vacate, set aside, or correct his sentence, citing this section, which motion claimed that the trial judge failed to strictly comply with the requirements of § 23-111(b) by not asking him, after his conviction, whether he affirmed or denied any prior convictions, should have instead attacked the sentence as one imposed in an "illegal manner" under Superior Court Criminal Rule 35(a), and therefore the motion was subject to the 120 day jurisdictional limitation for challenge. *Norman v. United States*, App. D.C., 623 A.2d 1165 (1993).

Motion for new trial filed more than 5 days after verdict was untimely. *Williams v. United States*, 295 A.2d 503 (1972).

One-year lapse between guilty plea and motion. — A defendant is not barred from bringing motion pursuant to this section because of a 1-year lapse of time between the guilty plea and the motion. *Williams v. United States*, App. D.C., 408 A.2d 996 (1979).

Arnold decision prohibiting certain separate convictions is retroactive. — The constitutional interpretation by the Court of Appeals in *Arnold v. United States*, 467 A.2d 136 (1983), that the Double Jeopardy Clause of the Fifth Amendment prohibits separate convictions for grand larceny and unauthorized use of a vehicle arising out of the same transaction, is fully retroactive. *Kirk v. United States*, App. D.C., 510 A.2d 499 (1986).

Rejection by the Court of Appeals of a Fifth Amendment merger of offenses claim on direct appeal in an unpublished memorandum order issued prior to *Arnold v. United States*, 467 A.2d 136 (1983), does not preclude raising the issue again by way of a § 23-110 motion to vacate or correct sentence. *Kirk v. United States*, App. D.C., 510 A.2d 499 (1986).

Standards for summary denial without hearing. — A court may summarily deny a motion under this section only when the motion, files or other records contain data which belie the prisoner's claim and such contradiction is not susceptible of reasonable explanation. *Pettaway v. United States*, App. D.C., 390 A.2d 981 (1978).

In denying a motion without a hearing, the court must conclude that under no circumstances could the petitioner establish facts warranting relief. *Pettaway v. United States*, App. D.C., 390 A.2d 981 (1978).

To uphold the denial of a motion without a hearing, a court must conclude that under no circumstances could the movant establish facts warranting relief. *Head v. United States*, App. D.C., 626 A.2d 1382 (1993), cert. denied, — U.S. —, 115 S. Ct. 156, 130 L. Ed. 2d 95 (1994).

Weighted in favor of prisoner. — Because this section provides a habeas corpus type remedy for District of Columbia prisoners, any question whether a hearing is appropriate should be resolved in the affirmative. *Gibson v. United States*, App. D.C., 388 A.2d 1214 (1978).

Because this section is a remedy of virtually last resort, any question whether a hearing is appropriate should be resolved in the affirmative. *Glass v. United States*, App. D.C., 395 A.2d 796 (1978); *United States v. Eastridge*, 110 WLR 1181 (Super. Ct.); *United States v. Hawkins*, 110 WLR 1577 (Super. Ct.).

Presumption favoring hearing. — There is a presumption that a trial court presented with motion attacking a sentence should conduct a hearing. *Gaston v. United States*, App. D.C., 535 A.2d 893 (1988).

Where the motion to vacate alleges ineffective assistance of trial counsel, the necessity for

a hearing is increased because the nature of a defendant's complaint may necessarily involve matters outside the record. *United States v. McCray*, 116 WLR 677 (Super. Ct.).

There is a presumption in favor of holding a hearing on a motion under this section alleging ineffective assistance of counsel that requires an inquiry into matters outside the record. *Ready v. United States*, App. D.C., 620 A.2d 233 (1993).

Where the court is faced with a claim of ineffective assistance of counsel, the provision in (c) that "[u]nless the motion and files and records conclusively show that the prisoner is entitled to no relief," the judge must grant a "prompt hearing thereon," creates a presumption that a hearing should be held. This is especially true where the allegations of ineffectiveness relate to facts outside the trial record. *Webster v. United States*, App. D.C., 623 A.2d 1198 (1993).

Where the court is faced with a claim of ineffective assistance of counsel, subsection (c)'s provision that "[u]nless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief," the judge must grant a "prompt hearing thereon," creates a presumption that a hearing should be held especially where the allegations of ineffectiveness relate to facts outside the trial record. At the same time, the appellate court must recognize the superior vantage point of the trial judge from which to determine whether there is any appreciable possibility that a hearing could establish either constitutionally defective representation or prejudice to the defendant in the Strickland sense. *Hollis v. United States*, App. D.C., 623 A.2d 1229 (1993).

Although the right to a hearing is presumed under this section, specifically when the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, a hearing is not necessary. *Minor v. United States*, App. D.C., 647 A.2d 770 (1994), cert. denied, — U.S. —, 116 S. Ct. 347, 133 L. Ed. 2d 244 (1995).

Court has duty to be indulgent of pro se pleadings. *United States v. Hawkins*, 110 WLR 1577 (Super. Ct.).

Facts alleged in pro se motion hereunder must be susceptible to characterization as gross incompetence. — Notwithstanding the presumption of validity which attaches to a pro se motion under this section, where a claim of ineffective assistance of counsel is raised, the facts alleged in the motion must still be susceptible to characterization as gross incompetence which has in effect blotted out the essence of a substantial defense. *Smith v. United States*, App. D.C., 454 A.2d 822 (1983).

Discretion of trial court to appoint counsel. — Even when the matters advanced

by a movant do not appear to require a hearing under this section, the trial court has the discretion to appoint counsel to aid movant in marshalling and presenting a request for relief. *Doe v. United States*, App. D.C., 583 A.2d 670 (1990).

Duty of appointed counsel on appeal. — An inherent part of responsibility of counsel first appointed on direct appeal is to consider whether the client's interests require the filing of a motion under this section based on ineffectiveness of counsel. *Doe v. United States*, App. D.C., 583 A.2d 670 (1990).

The duty of appellate counsel to investigate possible ineffective assistance of counsel claims is triggered by what the appellant (and trial counsel) tell appellate counsel in response to a reasonably thorough inquiry, and by what is reasonably noticeable from the trial court's records; accordingly, appointed counsel on direct appeal is obliged to make reasonable inquiry into the possibility of ineffective assistance of counsel at trial by researching and developing points thus uncovered that might give rise to a claim of ineffectiveness. *Doe v. United States*, App. D.C., 583 A.2d 670 (1990).

Requirements to prevail, and for hearing, on ineffective assistance of counsel. — To prevail on a motion under this section, the movant must, as a threshold matter, allege with particularity those facts and circumstances as would demonstrate the allegations of ineffectiveness of counsel. Even then, however, the movant is entitled to a hearing on his claims regarding the ineffective assistance of trial counsel only when the claims cannot be disposed of by resort to the files and records of the case because the claims involve matters outside of the record. *Ellerbe v. United States*, App. D.C., 545 A.2d 1197, cert. denied, 488 U.S. 868, 109 S. Ct. 174, 102 L. Ed. 2d 144 (1988).

The movant in a proceeding under this section who claims ineffective assistance must demonstrate, first, that counsel's performance at trial was deficient, and second, that counsel's deficient performance prejudiced the defense. *Gray v. United States*, App. D.C., 617 A.2d 521 (1992).

Defendant's post-appellate motion under this section, claiming ineffective assistance of appellate counsel, was improperly raised. Under this section only the judgment of conviction in the trial court is vacated; to revive the direct appeal from his conviction, or the appeal from the denial of his first motion to vacate, defendant must move to recall the mandates. *Head v. United States*, App. D.C., 626 A.2d 1382 (1993), cert. denied, — U.S. —, 115 S. Ct. 156, 130 L. Ed. 2d 95 (1994).

In order to prevail on a claim of ineffective assistance of counsel, a movant must show not only that trial counsel's performance was deficient under prevailing professional norms, but

also that but for trial counsel's error there is a reasonable probability that the defendant would have been found not guilty. *McKinnon v. United States*, App. D.C., 644 A.2d 438, cert. denied, — U.S. —, 115 S. Ct. 523, 130 L. Ed. 2d 428 (1994).

Requirements to prevail, and for hearing, on ineffective assistance of counsel. — Where the second motion raises issues essentially identical to those unsuccessfully raised in previous proceedings, under most circumstances, the trial court would be free to deny the motion without conducting a hearing or appointing counsel. *Brown v. United States*, App. D.C., 656 A.2d 1133 (1995).

Especially where he alleges ineffective assistance of counsel. — Defendant was entitled to a hearing on his motion under this section alleging deprivation of effective assistance of counsel where the motion was supported by factual allegations upon which the record could cast no real light, and which the trial judge could not resolve by drawing on his personal knowledge or recollection. *Session v. United States*, App. D.C., 381 A.2d 1 (1977).

Where a motion under this section not only contains allegations which, if true, merit relief and are not vague, conclusory or wholly incredible, but also alleges ineffective assistance of counsel, the necessity for a hearing is increased because the nature of the complaint, i.e., ineffective assistance of counsel which resulted in a plea of guilty, may necessarily involve matters outside the record. *Gibson v. United States*, App. D.C., 388 A.2d 1214 (1978).

But hearing not automatic even when effectiveness of counsel challenged. — A motion for new trial alleging ineffective assistance of counsel does not automatically require a hearing. *Glass v. United States*, App. D.C., 395 A.2d 796 (1978); *United States v. Eastridge*, 110 WLR 1181 (Super. Ct.).

Where all of defendant's allegations concerning ineffective assistance of counsel related solely to facts already in the record and only required the trial court to apply the correct legal standard to reach its conclusion as to the merits of the claim, and the facts of the record conclusively showed that he was entitled to no relief, the appellate court upheld the trial court's decision not to conduct a hearing. *Glass v. United States*, App. D.C., 395 A.2d 796 (1978).

It was not error for trial court to deny, without a hearing, defendant's petition for postconviction relief based on alleged ineffectiveness of counsel where the motion was vague and conclusory with no facial validity, where there was no claim of innocence or claim that plea of guilty was not entered voluntarily, and where defendant's attorney had filed numerous pretrial motions on defendant's behalf. *Bettis v. United States*, App. D.C., 325 A.2d 190 (1974).

The filing of a motion under this section does not automatically require the trial court to conduct a hearing. *Ready v. United States*, App. D.C., 620 A.2d 233 (1993).

Although hearings on motions under this section are particularly appropriate where the movant alleges ineffective assistance of counsel, an evidentiary hearing on an ineffective assistance claim is not compelled in every case. *Head v. United States*, App. D.C., 626 A.2d 1382 (1993), cert. denied, — U.S. —, 115 S. Ct. 156, 130 L. Ed. 2d 95 (1994).

Allegations insufficient to require hearing. — Allegations in defendant's motion to vacate sentence were insufficient to require the trial court to hold a hearing, where the record before the trial court permitted it to evaluate the likely effect on the jury had the witness's affidavit been truthful and assuming the truthfulness of the witness's relatives' affidavits. *Derrington v. United States*, App. D.C., 488 A.2d 1314 (1985), cert. denied sub nom., *Grayson v. United States*, 486 U.S. 1009, 108 S. Ct. 1738, 100 L. Ed. 2d 201 (1988).

Trial court acted properly in denying defendant a hearing on his claim. *Shepard v. United States*, App. D.C., 533 A.2d 1278 (1987).

Where judge ruled that newly discovered evidence was inherently incredible, and where this finding was supported by the record and not clearly erroneous, the appellate court was not required to resolve which test applied in determining whether the judge erred in denying appellant's motion for a new trial. *Young v. United States*, App. D.C., 639 A.2d 92 (1994).

The trial court did not abuse its discretion when it decided to deny appellant's motion for a new trial without a hearing; not only had the court already entertained a motion for similar relief at an earlier hearing, but also appellant clearly was not entitled to relief even if his allegations were true. *Minor v. United States*, App. D.C., 647 A.2d 770 (1994), cert. denied, — U.S. —, 116 S. Ct. 347, 133 L. Ed. 2d 244 (1995).

Motion must explain exact nature of alleged ineffectiveness of counsel. — On motion to vacate sentence, trial court is not required to hold hearing on issue of whether movant's trial counsel had been unconstitutionally ineffective, in absence of exact nature of asserted ineffectiveness being explained in motion. *Hurt v. St. Elizabeths Hosp.*, App. D.C., 366 A.2d 780 (1976).

The trial court is not required to conduct a hearing on a motion under this section alleging ineffective assistance of counsel if the exact nature of the asserted ineffectiveness is not explained in the motion. *Glass v. United States*, App. D.C., 395 A.2d 796 (1978).

Defendant's motion filed before sentencing. — This section only authorizes a motion to vacate, set aside, or correct a sentence; and where the defendant's motion was filed before

sentencing, it could not have been a motion to vacate sentence, therefore, the trial judge properly treated it as a Superior Court Criminal Rule 33 motion. *Johnson v. United States*, App. D.C., 585 A.2d 766 (1991).

Ineffective assistance claim in presentence motions. — An ineffective assistance of counsel claim in presentence motions did not make them motions filed under this section. Such claims may be raised under both Rule 33 and this section. *Junior v. United States*, App. D.C., 634 A.2d 411 (1993).

Second hearing not waived when prior hearing a nullity. — Where there was nothing in the record showing that defendant was either informed of his right to counsel or that he waived that right, defendant was denied his statutory right to be represented by counsel during the hearing on the first motion. For that reason the first hearing was a nullity and did not serve as a bar to a successive § 23-110 petition. *Brown v. United States*, App. D.C., 656 A.2d 1133 (1995).

Government's breach of plea agreement as to sentencing may be remedied either by ordering resentencing by a different judge or, when appropriate, by allowing the defendant to withdraw the plea. *White v. United States*, App. D.C., 425 A.2d 616 (1980).

Guilty plea normally prevents defendant from later collaterally attacking sentence. — A voluntary and intelligent guilty plea normally prevents a defendant from making a collateral attack on his sentence at a later date. *United States v. Hawkins*, 110 WLR 1577 (Super. Ct. 1982).

Motion required for challenging validity of guilty plea. — Without a motion at trial under either Rule 32(e) of the Superior Court Rules of Criminal Procedure or this section, the validity of a guilty plea cannot be challenged before an appellate court. *Lorimer v. United States*, App. D.C., 425 A.2d 1306 (1981).

Attack on voluntariness of guilty plea governed by "manifest injustice" standard. — Motions under this section attacking the voluntariness of guilty pleas are to be adjudicated under the "manifest injustice" standard of Superior Court Criminal Rule 32(e). *McClurkin v. United States*, App. D.C., 472 A.2d 1348, cert. denied, 469 U.S. 838, 105 S. Ct. 136, 83 L. Ed. 2d 76 (1984).

The trial court could conclude no "manifest injustice" existed in explanation of sentence to defendant to warrant a plea withdrawal, where court specifically reviewed the possible sentence with defendant and counsel, and defendant never expressed any confusion over the possible sentence. *Johnson v. United States*, App. D.C., 597 A.2d 917 (1991).

Standard for granting motion to vacate sentence. — Pursuant to Super. Ct. Crim. R. 32(e), a motion to withdraw a guilty plea made

after the sentence has been imposed, is to be granted only to prevent "manifest injustice," and the same standard applies to a motion to vacate a sentence made under this section. *United States v. Shaw*, 114 WLR 1389 (Super. Ct. 1986).

In order to prevail on a post-sentence motion either to withdraw a guilty plea under Super. Ct. Crim. R. 32(e), or to vacate a sentence under this section, defendant must show that he suffered manifest injustice and that the trial court's refusal to grant his motion was an abuse of discretion. *Eldridge v. United States*, App. D.C., 618 A.2d 690 (1992).

Insanity acquittees seeking to withdraw plea subject to manifest injustice standard. — For purposes of collaterally attacking a not guilty by reason of insanity plea, committed insanity acquittees stand in the same position as defendants who seek to withdraw a guilty plea, and are subject to the "manifest injustice" standard. *Morrison v. United States*, App. D.C., 579 A.2d 686 (1990).

Defendant's denial of guilt following conviction held insufficient to permit withdrawal of guilty plea. — See *United States v. Shaw*, 114 WLR 1389 (Super. Ct. 1986).

Three categories of claims do not merit hearings: (1) Palpably incredible claims, (2) assertions which even if true would not entitle the movant to relief under the terms of subsection (a) and (3) vague and conclusory allegations. *Gibson v. United States*, App. D.C., 388 A.2d 1214 (1978); *Pettaway v. United States*, App. D.C., 390 A.2d 981 (1978); *Gregg v. United States*, App. D.C., 395 A.2d 36 (1978); *Gaston v. United States*, App. D.C., 535 A.2d 893 (1988); *Sanders v. United States*, App. D.C., 550 A.2d 343 (1988).

This section requires an evidentiary hearing unless the allegations of the motion itself are vague and conclusory, are wholly incredible, or even if true, would merit no relief. *Smith v. United States*, App. D.C., 454 A.2d 822 (1983).

A hearing is unnecessary when the motion consists of (1) vague and conclusory allegations, (2) palpably incredible claims, or (3) allegations that would merit no relief even if true. *Ready v. United States*, App. D.C., 620 A.2d 233 (1993).

Specifications of motion under this section must indicate the absence of a fair trial in the real sense of that term, must not be couched in conclusory terms with essentially no factual foundation and, even if true, must not be patently frivolous on their face. *Gibson v. United States*, App. D.C., 388 A.2d 1214 (1978); *Glass v. United States*, App. D.C., 395 A.2d 796 (1978); *Smith v. United States*, App. D.C., 454 A.2d 822 (1983).

Motion must state claim requiring vacation or alteration of sentence. — If it appears that the motion does not state a claim

which if established would require the vacation or alteration of the sentence, no hearing is required. *Glass v. United States*, App. D.C., 395 A.2d 796 (1978); *United States v. Hawkins*, 110 WLR 1577 (Super. Ct. 1982).

Where defendant's allegations in his motion to vacate, if true, would entitle him to relief, and bear on a disputed issue of fact, the trial court should grant him a hearing on his motion. *Samuels v. United States*, App. D.C., 435 A.2d 392 (1981).

If the petitioner does not state in his motion a claim which, if true, would require vacating his sentence, then no hearing is required. *United States v. Eastridge*, 110 WLR 1181 (Super. Ct. 1982).

The major requirement needed to show that one is entitled to relief is to allege facts which, if true, would entitle one to vacation of sentence. *Alexander v. United States*, App. D.C., 409 A.2d 618 (1979).

And must be specific rather than conclusory. — The facts alleged in a motion pursuant to this section must be specific rather than conclusory. *Alexander v. United States*, App. D.C., 409 A.2d 618 (1979).

Vague and conclusory motions dismissed without hearing. — A motion is vulnerable to dismissal as vague and conclusory when a prisoner does not present a factual foundation in some detail. *Pettaway v. United States*, App. D.C., 390 A.2d 981 (1978); *United States v. McClurkin*, 110 WLR 1657 (Super. Ct. 1982).

Claim under this section challenging the voluntariness of the claimant's guilty plea and his attorney's effectiveness and alleging promises of a sentence of about 5 years and a sentence reduction after a year or so was too vague and conclusory to necessitate a hearing. *Pettaway v. United States*, App. D.C., 390 A.2d 981 (1978).

A vague and conclusory allegation of prejudice is insufficient to require a hearing under this section. *Hollis v. United States*, App. D.C., 623 A.2d 1229 (1993).

To prevail on a motion under this section, the movant must, as a threshold matter, allege with particularity those facts and circumstances as would demonstrate the allegations of ineffectiveness; thus, where appellant's motion set forth only broad, conclusory allegations, the motion was denied. *Head v. United States*, App. D.C., 626 A.2d 1382 (1993), cert. denied, — U.S. —, 115 S. Ct. 156, 130 L. Ed. 2d 95 (1994).

Motion to vacate sentence properly denied. — Trial court properly denied a motion to vacate which claimed ineffective assistance of counsel at trial. *Tibbs v. United States*, App. D.C., 628 A.2d 638 (1993).

Appellate court affirmed denial of defendant's motion to vacate his sentence where defendant had the notice required by § 23-

111(a)(1), and the trial court acted according to law in imposing an enhanced sentence. *Coleman v. United States*, App. D.C., 628 A.2d 1005 (1993).

Claims which survive vagueness test may not necessarily be ripe for full evidentiary hearings; in some instances a motion for summary judgment is a more appropriate way to proceed initially. *Pettaway v. United States*, App. D.C., 390 A.2d 981 (1978).

Claims must withstand some checking for verity. — Just as palpably incredible claims can be summarily dismissed, so also can those claims which cannot withstand initial checking for verity or, at the least, the probability of verity. *Gregg v. United States*, App. D.C., 395 A.2d 36 (1978).

Where there were no factual issues to be decided and the only dispute was over the proper interpretation of § 22-104a, there was no need for a hearing on the matter. *McDonald v. United States*, App. D.C., 415 A.2d 538 (1980).

Court of Appeals' prior affirmance of convictions ended any controversy respecting identification procedures and sufficiency of evidence, so on appeal from order denying motion for relief from sentences, the Court would only consider the constitutional claim that defendant was denied effective assistance of counsel. *Atkinson v. United States*, App. D.C., 366 A.2d 450 (1976).

Claim of ineffective assistance of counsel must properly be pursued under this section and not under a writ of error coram nobis. *United States v. Higdon*, App. D.C., 496 A.2d 618 (1985).

Effect of data belying claim of ineffective assistance of counsel. — No hearing on motion for new trial based on claim of ineffective assistance of counsel is required under this section if the record below contains data which belie a defendant's claim, and such contradiction is not susceptible of reasonable explanation, where even if the facts as stated by defendant were true, he would not be entitled to relief under subsection (a). *White v. United States*, App. D.C., 484 A.2d 553 (1984).

Test applied to ineffective assistance of counsel claim raised by motion pursuant to this section is whether the representation by counsel was so grossly incompetent as to blot out the essence of the defense. *Cunningham v. United States*, App. D.C., 408 A.2d 1240 (1979); *Wesley v. United States*, App. D.C., 449 A.2d 282 (1982); *United States v. Eastridge*, 110 WLR 1181 (Super. Ct. 1982); *United States v. McClurkin*, 110 WLR 1657 (Super. Ct. 1982); *Godfrey v. United States*, App. D.C., 454 A.2d 293 (1982); *United States v. Price*, 112 WLR 553 (Super. Ct. 1984); *United States v. Diamen*, 112 WLR 1937 (Super. Ct. 1984).

The test used to determine ineffective assis-

tance of counsel is whether counsel blotted out a substantial defense through gross ineptness. *Alexander v. United States*, App. D.C., 409 A.2d 618 (1979).

Evidence of ineffective assistance of counsel not limited to trial record. — Although not required for any claim of ineffectiveness of counsel, raising of claim in motion for new trial or in motion attacking sentence is likely to be more productive than direct appeal, because proceeding will not be limited to evidence in the trial record. *Proctor v. United States*, App. D.C., 381 A.2d 249 (1977).

Normally, a criminal defendant should present a claim of ineffective assistance of counsel under this section or under Superior Court Criminal Rule 33, so that the defendant can bring before the court evidence outside the trial record. *Godfrey v. United States*, App. D.C., 454 A.2d 293 (1982).

Where defendant did not file a separate motion attacking his conviction pursuant to this section, Court of Appeals would not assess defendant's claim of ineffective assistance of counsel based exclusively on the trial record, as court is in best position to assess claim of ineffective assistance of counsel when separate motion has been filed and an appropriate record has been made; and government should not have been deprived of its opportunity to examine defense counsel as a witness, to obtain and submit evidence that defense counsel's decisions were based on reasonable tactical considerations. *Mack v. United States*, App. D.C., 570 A.2d 777 (1990).

Ineffective assistance of appellate counsel. — The issue of an ineffective assistance of appellate counsel can only be litigated through the filing of a motion to recall the mandate in this court. *Mayfield v. United States*, App. D.C., 659 A.2d 1249 (1995).

Trial courts may not consider ineffective assistance of appellate counsel when ruling on § 23-110 claims. *Mayfield v. United States*, App. D.C., 659 A.2d 1249 (1995).

In cases where a claim is truly defaulted on direct appeal due to ineffective assistance, a defendant will receive effective review of the substantive issue by this court in the course of ruling on a timely motion for recall of the mandate and subsequent appellate proceedings. *Mayfield v. United States*, App. D.C., 659 A.2d 1249 (1995).

Evaluation of defendant's motion alleging ineffective assistance of counsel. — Although defendant's motion was filed pursuant to Superior Court Criminal Rule 33, it alleged ineffective assistance of counsel, and should therefore have been evaluated as if it were a motion under this section, requiring a hearing. *Johnson v. United States*, App. D.C., 585 A.2d 766 (1991).

Defendant was procedurally barred from as-

serting an ineffective assistance of counsel claim where the appeal arose out of appellant's fourth motion in which he asserted for the first time (more than seven years after his guilty plea and sentencing) that, at the time he entered his plea, his counsel had been ineffective for not requesting a judicial recommendation against deportation. *Matos v. United States*, App. D.C., 631 A.2d 28 (1993).

Trial counsel's performance was deficient in that he should have filed a motion to suppress evidence and his failure to do so could only be characterized as ineffective assistance which entitled defendant to his motion to vacate sentence. *United States v. McCray*, 116 WLR 677 (Super. Ct. 1988).

Defendant was entitled to hearing on her motion to withdraw her guilty plea where she was misinformed by her trial counsel concerning the availability of the addict exception in her case. *Gaston v. United States*, App. D.C., 535 A.2d 893 (1988).

Trial counsel was constitutionally ineffective where the attorney failed to call two exculpatory witnesses who had testified favorably to the defendant at the preliminary hearing and failed to interview several others. *Byrd v. United States*, App. D.C., 614 A.2d 25 (1992).

Monroe-Farrell inquiries. — When a defendant makes complaints that might trigger a full Monroe-Farrell inquiry (*Monroe v. U.S.D.C.* Ct. App. 389 A.2d 811, cert. denied, 439 U.S. 1006, 99 S. Ct. 621, 58 L. Ed. 2d 683 (1978), but later tells the court that he is now satisfied with his counsel or no longer desires new counsel, the court need not continue further into the matter. *McKenzie v. United States*, App. D.C., 659 A.2d 838 (1995).

Failure to raise claim of ineffective counsel during direct appeal necessitates showing of cause and prejudice. — If a defendant does not raise a claim of ineffective assistance of counsel during the pendency of the direct appeal, when at that time defendant demonstrably knew or should have known of the grounds for alleging counsel's ineffectiveness, that procedural default will be a barrier to this court's consideration of his claim; showing of cause and prejudice is a prerequisite to review by court of appeals of defendant's claim where there has been such a procedural default. *Shepard v. United States*, App. D.C., 533 A.2d 1278 (1987).

Claims of ineffective assistance of trial counsel will usually require a hearing, since the trial record will not typically provide the trial court with a basis on which to determine whether allegations of ineffectiveness can be rationally explained as reasonable tactical decisions by trial counsel. A hearing is not required if there are (1) vague and conclusory allegations, (2) palpably incredible claims, or (3) assertions that would not merit relief even if

true. *Smith v. United States*, App. D.C., 608 A.2d 129 (1992).

Hearing not required. — None of the defendant's claims, considered separately or together, was sufficient to require a hearing because, even if true, they did not meet the test for ineffective assistance established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *Johnson v. United States*, App. D.C., 610 A.2d 729 (1992).

Lapse of time and prejudice to the government cannot, by themselves, bar a motion under this section seeking to withdraw a guilty plea based on alleged ineffectiveness of counsel. The trial court, however, in conducting an evidentiary hearing, may consider the length of delay, any excuses for that delay, and any resulting prejudice to the government as factors bearing on the credibility of defendant's claim. *Ramsey v. United States*, App. D.C., 569 A.2d 142 (1990).

Trial counsel's tactical decision not sufficient. — Where at a hearing on defendant's ineffective assistance of counsel allegation, defendant's trial counsel testified that he had made a tactical decision not to call a witness based on his belief that the witness's testimony would be more inculpatory than exculpatory, there was no reason to second guess this strategic choice. *Parker v. United States*, App. D.C., 601 A.2d 45 (1991).

Effective counsel not denied where tactical value of alibi defense questionable. — The trial court did not err in denying a motion to vacate a sentence on the contention that the defendant was denied effective assistance of counsel due to counsel's failure to assert an alibi defense, where the tactical disadvantages of such defense outweighed its evidentiary value. *Wright v. United States*, App. D.C., 387 A.2d 582 (1978).

Nor where counsel failed to present incident affecting weight of testimony. — Where contention of ineffective assistance of counsel was based upon counsel's failure to bring to the attention of the trial court an incident that would have affected the weight afforded to the victim's identification of defendant at trial, not its admissibility, the court did not err in denying a motion to vacate sentence without a hearing. *Atkinson v. United States*, App. D.C., 366 A.2d 450 (1976).

Nor where erroneous advice insignificant to plea. — Order denying relief under this section was affirmed where the record supported the trial court's finding that counsel's erroneous advice was an insignificant factor in the prisoner's decision to plead guilty. *Bailey v. United States*, App. D.C., 385 A.2d 32, cert. denied, 439 U.S. 871, 99 S. Ct. 203, 58 L. Ed. 2d 183 (1978).

Nor where attorney effectively presented sole substantial defense. — Where the only substantial defense ever alleged by defendant was his lack of knowledge of the offense, and his counsel placed the essence of that defense before the jury in a reasonably effective manner, the trial judge was correct in denying defendant's motion for a new trial pursuant to this section. *Glass v. United States*, App. D.C., 395 A.2d 796 (1978).

Counsel's failure to establish location of incident. — Trial counsel's failure to establish by documentary and evidentiary testimony the location of the incident could not be viewed as a reasonable tactical decision. *Smith v. United States*, App. D.C., 608 A.2d 129 (1992).

Inconsistency between defendant's testimony and allegation of ineffectiveness of counsel. — Where movant seeking a vacation of sentence had testified in support of his self-defense claim, thus judicially admitting his presence at the scene of the offense, and there was no plausible explanation given for the inconsistency of that claim with his claim on appeal that his trial counsel had been ineffective in failing to investigate a possible alibi defense, movant was not entitled to hearing on issue. *Hurt v. St. Elizabeths Hosp.*, App. D.C., 366 A.2d 780 (1976).

Where defendant was informed by counsel of his right to appeal, but counsel failed to ask specifically whether defendant wanted an appeal filed, the defendant was not entitled to vacation of his criminal conviction. *Hargett v. United States*, App. D.C., 380 A.2d 1005 (1977), cert. denied, 439 U.S. 932, 99 S. Ct. 324, 58 L. Ed. 2d 327 (1978).

Where counsel failed to make an investigation which allegedly would have disclosed a legitimate reason for the defendant's presence at the scene of the crime, but such explanation, even if established, would not constitute a substantial defense in view of evidence of the defendant's participation in the crime, flight, and exchange of gunfire, the contention of ineffective assistance of counsel did not require a hearing. *Atkinson v. United States*, App. D.C., 366 A.2d 450 (1976).

Failure to investigate held error. — Defendant's motion for relief under this section was granted and his conviction and sentence were vacated where his counsel failed to obtain and interpret relevant medical records and where defendant was prejudiced thereby. *United States of Am. v. Berry*, 123 WLR 265 (Super. Ct. 1995).

Adequate specific showing that prima facie ineffectiveness exists is required before the District of Columbia Court of Appeals will grant the Public Defender Service leave to withdraw and appoint new counsel to determine whether to assert such an issue in the reviewing court or to seek collateral relief in the

trial court. *Angarano v. United States*, App. D.C., 329 A.2d 453 (1974).

Newly discovered evidence not likely to result in acquittal. — Court properly denied motion for a new trial based on newly discovered evidence and ineffective assistance of counsel where the newly discovered evidence was not of such a nature that an acquittal would likely result from its use. *Townsend v. United States*, App. D.C., 549 A.2d 724 (1988), cert. denied, 490 U.S. 1102, 109 S. Ct. 2457, 104 L. Ed. 2d 1011 (1989).

Appellant must establish existence of available legal defense. — Appellant challenging trial court's denial of motion to vacate sentence on grounds of ineffective assistance of counsel must establish the existence of a legal defense available from facts known or obvious to the trial attorney in order to establish ineffective assistance. *Wesley v. United States*, App. D.C., 449 A.2d 282 (1982).

Competing affidavits not a basis for denying motion without hearing. — Competing affidavits are not a permissible basis for rejecting a claim of ineffective assistance without a hearing, as witness credibility is typically reflected best through live testimony under oath. *Hollis v. United States*, App. D.C., 623 A.2d 1229 (1993).

Trial court erred in not holding hearing on motion alleging ineffective assistance of counsel. *Miller v. United States*, App. D.C., 479 A.2d 862 (1984); *Hockman v. United States*, App. D.C., 517 A.2d 44 (1986).

Failure of defense counsel to insist that defendant not testify held not ineffective assistance of counsel. — See *United States v. Pernell*, 114 WLR 917 (Super. Ct. 1986).

Proof needed to vacate sentence for ineffective counsel. — Allegations in a motion for relief because of ineffective counsel (1) must indicate the absence of a fair trial, (2) must not be couched in vague and conclusory terms with essentially no factual foundation, and (3) must not be patently frivolous, even if true. Mere errors of judgment as disclosed by subsequent events are not sufficient to establish ineffective assistance. *United States v. Diamen*, 112 WLR 1937 (Super. Ct. 1984).

Substantial defense construed. — A substantial defense is not limited to presentation of an alternative theory-of-the-case but includes admission of evidence that substantially will discredit the opposing party's case-in-chief. *Godfrey v. United States*, App. D.C., 454 A.2d 293 (1982).

Evidentiary hearing required. — Where defendant has asserted his innocence, has advanced a colorable claim that his trial counsel was deficient, has stated that but for counsel's errors defendant would not have pleaded guilty, and has presented an affidavit from a proffered government witness which raises a material

factual issue, this section requires an evidentiary hearing on defendant's claims. *Ramsey v. United States*, App. D.C., 569 A.2d 142 (1990).

Remand of the record for further proceedings on defendant's motion to vacate sentence was required where, based on the trial court's order rendered without a hearing, the Court of Appeals was unable to say with certainty that appellant would not be entitled to relief even if his allegations were true. *Rice v. United States*, App. D.C., 580 A.2d 119 (1990).

Trial judge erred in denying defendant's motion to vacate without an evidentiary hearing to determine whether defendant had a self-defense claim. *Johnson v. United States*, App. D.C., 597 A.2d 917 (1991).

Failure to impeach key witness with highly credible evidence. — A substantial defense is lost if counsel fails to impeach a key government witness with highly credible evidence, including inconsistent statements made before trial, or during trial after the witness has testified. *Godfrey v. United States*, App. D.C., 454 A.2d 293 (1982).

Trial counsel's failure to interview 3 co-defendants, all of whom had pled guilty and were sentenced prior to defendant trial and who could not provide affirmatively exculpatory testimony, was not sufficiently prejudicial to support a claim of ineffective assistance of counsel. *United States v. Frost*, App. D.C., 502 A.2d 462 (1985), cert. denied, 479 U.S. 836, 107 S. Ct. 134, 93 L. Ed. 2d 77 (1986).

Mere errors of judgment not sufficient. — Mere errors of judgment, as disclosed by subsequent events, are not sufficient to establish ineffective assistance of counsel. *Wesley v. United States*, App. D.C., 449 A.2d 282 (1982).

Ill-conceived tactical decision not sufficient. — Even if the tactical decision later turns out to be ill-conceived, hindsight cannot transform such a decision into anything approaching gross incompetence. *United States v. Eastridge*, 110 WLR 1181 (Super. Ct. 1982).

Upon review of alleged suppression of "deal" for testimony, the Court of Appeals reviews the nature of the promise, if any, and the effect its disclosure could have on the credibility of the witness. *Derrington v. United States*, App. D.C., 488 A.2d 1314 (1985), cert. denied sub nom., *Grayson v. United States*, 486 U.S. 1009, 108 S. Ct. 1738, 100 L. Ed. 2d 201 (1988).

Validity of sentencing hearing. — Omission of information, as well as submission of material false information or a court's careless interpretation of evidence before it, is sufficient to undermine the validity of a sentencing hearing. *United States v. Hamid*, 113 WLR 2481 (Super. Ct. 1985).

Failure to produce alibi witness whose testimony would not support alibi defense. — Where the record reflects that efforts

had been made to locate an alibi witness, but it was found that his testimony would not have supported appellant's alibi defense, trial counsel's failure to produce the alibi witness did not constitute ineffective assistance of counsel. *Wesley v. United States*, App. D.C., 449 A.2d 282 (1982).

Conduct not constituting ineffective assistance of counsel. — Where defense counsel, relying on appellant's representation that there was no design on the back of his jacket, failed to examine the jacket before entering it into evidence in a tactical move designed to discredit a witness who testified that there was a design on the back of the culprit's jacket, and where appellant then testified on cross-examination that his jacket had criss-cross stitching on the back, counsel's omission did not constitute ineffective assistance of counsel. *Wesley v. United States*, App. D.C., 449 A.2d 282 (1982).

Trial counsel's failure to move for dismissal based upon defendant's Interstate Agreement on Detainers Act rights did not fall below the standard of reasonableness under prevailing professional norms. *United States v. Jones*, 120 WLR 2441 (Super. Ct. 1992).

Defendant failed to meet his burden of demonstrating that deficiencies in his trial counsel's performance made a difference in the outcome where, assuming defendant's trial counsel's performance was deficient, the government presented an overwhelming case. *Luchie v. United States*, App. D.C., 610 A.2d 248 (1992).

Prisoner failed to show the required prejudice, where, even if defense counsel was deficient in preparing for trial and in failing to anticipate the evidentiary foundation necessary to put forth various defenses, the prisoner chose not to testify, and in order for defense counsel to have argued any of the defenses prisoner would have had to take the stand. *Johnson v. United States*, App. D.C., 613 A.2d 888 (1992).

Effective counsel even though defendant slept before jury. — Defendant's counsel was not ineffective for allowing defendant to sleep in front of the jury. *United States v. Davis*, 112 WLR 849 (Super. Ct. 1984).

Abuse of discretion by Trial Court. — Court's denial of Superior Court Criminal Rule 32(e) motion was analogous to summarily denying a motion under this section. Under the standards of this section the trial court abused its discretion by summarily denying the defendant's motion, by not inquiring prior to sentencing whether the defendant wanted to adhere to his guilty plea, given a material change of circumstances, and neglecting its duty to ensure that the defendant was not entering a guilty plea premised upon manifestly incorrect information. *Goodall v. United States*, App. D.C., 584 A.2d 560 (1990).

Allegations sufficient to require hearing. — Where counsel told the defendant that for \$1,500 he would work out a plea agreement with the government but never reapproached the defendant with any type of plea agreement, nor ever again mentioned a plea, this allegation, which is not inherently incredible, in view of an earlier plea offer by the government, raised a colorable claim of ineffective assistance requiring a hearing. *Johnson v. United States*, App. D.C., 585 A.2d 766 (1991).

Defendant's claim that his original trial counsel had been ineffective in failing to investigate the statements of certain potential witnesses and to present certain testimony was sufficient to require a hearing to determine whether such investigations were, in fact, ever undertaken. *Gray v. United States*, App. D.C., 617 A.2d 521 (1992).

Appellant's motions papers demonstrated that a hearing for a motion under this section could not properly be denied on the basis of any of the grounds permitted under the statute — namely, that the motion consists of (1) vague and conclusory allegations; (2) palpably incredible claims; or (3) assertions that would not merit relief even if true. *Matthews v. United States*, App. D.C., 629 A.2d 1185 (1993).

Failure to provide testimony of alibi witness. — Where defendant, convicted of assault with a deadly weapon, claims he was denied effective assistance of counsel because his attorney failed to provide the testimony of security guards who would allegedly testify the defendant was in their custody at the time of the shooting, a hearing was necessary, since it was not known by the judge what the guard's testimony would have been. *Gillis v. United States*, App. D.C., 586 A.2d 726 (1991).

Failure of counsel to interview witness. — Given the improbability of the notion that the defendant's companion on the night of the arrest would have admitted her own guilt to exonerate the defendant, counsel's decision not to interview her was arguably within the wide range of reasonable professional assistance and therefore did not constitute ineffective assistance of counsel. *Sykes v. United States*, App. D.C., 585 A.2d 1335 (1991).

Where counsel did not question the government's only eyewitness, and thereby failed to challenge the government's only evidence in conflict with key aspects of defendant's story, the trial judge could not reasonably find without a hearing to examine trial counsel's explanations that trial counsel's failure to impeach was a reasonable tactical decision. *Smith v. United States*, App. D.C., 608 A.2d 129 (1992).

Failure of counsel to address prior inconsistencies. — Trial counsel's decision not to address prior inconsistent police versions of events was sufficient to require a hearing on the question of counsel's effectiveness. *Bruce v.*

United States, App. D.C., 617 A.2d 986 (1992), cert. denied, — U.S. —, 113 S. Ct. 1878, 123 L. Ed. 2d 496 (1993).

New counsel appointed. — Defendant was not denied effective assistance of counsel where new counsel was appointed during the critical stage in which a motion for new trial could have been filed, for counsel could have requested an extension of the time to file the motion. *Hunter v. United States*, App. D.C., 588 A.2d 680, cert. denied, 502 U.S. 892, 112 S. Ct. 256, 116 L. Ed. 2d 210 (1991).

Attorney effectively pursued defense of causation. — The record refuted defendant's argument that his trial counsel was ineffective in that he failed to press the defense that cause of death was not established, where the record demonstrated that trial counsel cross-examined fully, but that despite his efforts, the jury had ample evidence on cause of death to find the victim died as a result of the stab wounds and secondary complications due to those wounds. *Doe v. United States*, App. D.C., 583 A.2d 670 (1990).

Where defendant claimed counsel was ineffective for not calling a witness, but the defendant failed to produce an affidavit from the witness, where the witness would have had to risk incriminating herself to assist the defendant, and where the defense case depends on a jury's crediting that the witness sold drugs to an officer after being warned by the defendant that he was a policeman, the trial judge acted within her discretion in concluding that a hearing could serve no useful purpose. *Sykes v. United States*, App. D.C., 585 A.2d 1335 (1991).

Discovery not within scope of challenge under this section. — Where materials sought from the Public Defender Service (PDS) did not fall within the scope of the challenge to trial counsel under this section, and where the PDS had been extremely helpful and forthcoming with successor counsel, the trial judge did not abuse his discretion in denying defendant's discovery motion. *Johnson v. United States*, App. D.C., 616 A.2d 1216 (1992), cert. denied, 507 U.S. 996, 113 S. Ct. 1611, 123 L. Ed. 2d 172 (1993).

Motion under this section inapplicable to executive department's execution of sentence. — Defendant's arguments for legal or equitable relief in the form of retroactive imposition of a concurrent sentence, coupled with good time credits, based on the fact that (1) despite a Youth Corrections Act (YCA) sentence he had never been segregated from adult prisoners, and (2) his 2nd conviction formally transformed the balance of his YCA sentence into an adult sentence, could not be raised under this section because such arguments concern the executive department's execution of sentence and not the trial court's imposition of sentence, and must be raised in a habeas

corpus petition. *Alston v. United States*, App. D.C., 590 A.2d 511 (1991).

Trial counsel's failure to file a motion to suppress fell below an objective standard of reasonableness under prevailing professional norms. *United States v. Simpson*, 119 WLR 1229 (Super. Ct. 1991).

Controlling weight may be given to denial of a prior application for collateral relief on the same ground as if the denial was on the merits, unless the ends of justice require that the claim be considered anew. *Vaughn v. United States*, App. D.C., 600 A.2d 96 (1991).

Direct appeal joined with collateral attack. — When a claim of pretrial ineffective assistance of counsel, alleged on direct appeal, is joined with a claim of ineffective assistance of counsel at trial, alleged on collateral attack under this section, the court should rule on the direct appeal before reaching the collateral attack. *McFadden v. United States*, App. D.C., 614 A.2d 11 (1992).

Ineffective assistance of counsel not found. *Kelly v. United States*, App. D.C., 590 A.2d 1031 (1991).

See *Johnson v. United States*, App. D.C., 616 A.2d 1216 (1992), cert. denied, 507 U.S. 996, 113 S. Ct. 1611, 123 L. Ed. 2d 172 (1993).

Trial judge did not err in concluding that appellant had failed to show that his trial counsel had rendered ineffective assistance of counsel on motion for new trial. *Kelly v. United States*, App. D.C., 590 A.2d 1031 (1991).

Motion alleging ineffective assistance of counsel was properly denied without a hearing. *Ready v. United States*, App. D.C., 620 A.2d 233 (1993).

Self-representation. — Where a trial has been conducted with a hybrid arrangement for representation wherein the defendant represents himself with some assistance from outside counsel, the defendant may assert an ineffectiveness claim that challenges counsel's competency regarding his united duties. *Ali v. United States*, App. D.C., 581 A.2d 368 (1990), cert. denied, 502 U.S. 893, 112 S. Ct. 259, 116 L. Ed. 2d 213 (1991).

Motion for reduction of sentence does not bar motion under this section. — The bar in subsection (e) of this section against successive motions for similar relief is not triggered by resort to a motion for reduction of sentence prior to a motion under this section. *Williams v. United States*, App. D.C., 408 A.2d 996 (1979).

Since defendant never noted a direct appeal from his conviction, there was no bar; a bar is applicable if, during the pendency of a direct appeal, the defendant learns or knows (or reasonably should know) of grounds for a motion under this section based on a claim of ineffective assistance of counsel, and then he or she must file such a motion in the trial court and

move to stay the appeal. *Johnson v. United States*, App. D.C., 633 A.2d 828 (1993).

Subsection (g) does not suspend privilege of the writ of habeas corpus in violation of the United States Constitution. *Swain v. Pressley*, 430 U.S. 372, 97 S. Ct. 1224, 51 L. Ed. 2d 411 (1977).

Nor does it merely require exhaustion of local remedies. *Swain v. Pressley*, 430 U.S. 372, 97 S. Ct. 1224, 51 L. Ed. 2d 411 (1977).

Testimony considered in support of verdict. — On review of a motion to vacate sentence, the testimony must be considered most strongly in support of the jury's verdict. *Derrington v. United States*, App. D.C., 488 A.2d 1314 (1985), cert. denied sub nom., *Grayson v. United States*, 486 U.S. 1009, 108 S. Ct. 1738, 100 L. Ed. 2d 201 (1988).

Section 16-713 has no retroactive application to guilty pleas entered before its enactment. *Alpizar v. United States*, App. D.C., 595 A.2d 991 (1991).

Withdrawal of guilty plea. — This section authorizes a convicted defendant to file a motion to vacate his sentence; withdrawal of a guilty plea is governed by Rule 32(e) of the Superior Court Criminal Rules. Although in some cases this distinction is significant, it was not where the trial court treated the motion as if made under Rule 32(e). *Johnson v. United States*, App. D.C., 633 A.2d 828 (1993).

Traditional authority of federal court extinguished. — The District of Columbia Court Reform and Criminal Procedure Act of 1970 extinguishes the traditional authority of the federal court to review local judicial actions in the District of Columbia by the issuance of writs of habeas corpus. *Bland v. Rodgers*, 332 F. Supp. 989 (D.D.C. 1971).

District of Columbia Court Reform and Criminal Procedure Act does not alter jurisdiction of federal courts in District to hear post-conviction motions and appeals brought under 28 U.S.C. § 2255, either by prisoners who were convicted of local offenses prior to the Act, or by prisoners convicted in federal court after the Act. *United States v. Frady*, 456 U.S. 152, 102 S. Ct. 1584, 71 L. Ed. 2d 816 (1982).

Appellate review. — Unless a party appeals from the denial of the motion, the only issues properly before the Court of Appeals are those the party raises on the basis of the record of trial. *Hall v. United States*, App. D.C., 559 A.2d 1321 (1989).

To the extent that any post-conviction motions raised issues that could have been, but were not, raised on direct appeal, appellant failed to make the two-part "cause and prejudice" showing required by *United States v. Frady*. *Vaughn v. United States*, App. D.C., 600 A.2d 96 (1991).

The appellate court cannot consider any mat-

ter relating to a motion under this section or a similar posttrial motion if the defendant fails to file a separate notice of appeal from its denial. *Taylor v. United States*, App. D.C., 603 A.2d 451, cert. denied, 506 U.S. 852, 113 S. Ct. 155, 121 L. Ed. 2d 105 (1992).

Correction in interest of justice. — Trial court's vacating of defendant's conviction and granting of a new trial, based on the mistaken belief that defendant's petition under this section could be treated as conceded, were so interrelated as to be regarded as a unitary error which warranted correction in the interest of justice. *Newton v. United States*, App. D.C., 613 A.2d 332 (1992).

New trial. — This section authorizes the court to grant a defendant a new trial and return the defendant to the legal status of being presumptively innocent. Once that occurs, a defendant must be treated like any defendant who is pending trial. A court must therefore consider whether pretrial release is required by § 23-1321. *United States v. Flynn*, 122 WLR 1021 (Super. Ct. 1994).

Power of court to release. — Superior Court has the inherent power to release an inmate who is seeking a new trial through a collateral attack on his or her conviction filed pursuant to subsection (c). *United States v. Flynn*, 122 WLR 1021 (Super. Ct. 1994).

Recourse to federal habeas corpus by District of Columbia prisoner. — Although prisoners sentenced by state courts may resort to federal habeas corpus after exhaustion of their state remedies, a District of Columbia prisoner has no recourse to a federal judicial forum unless the local remedy is inadequate or ineffective to test the legality of his detention. *Garris v. Lindsay*, 794 F.2d 722 (D.C. Cir.), cert. denied, 479 U.S. 993, 107 S. Ct. 595, 93 L. Ed. 2d 595 (1986); *Miles v. Rollins*, 733 F. Supp. 128 (D.D.C. 1990).

Even if this section proves inadequate or ineffective to test the legality of a prisoner's detention, a second hurdle encompassed in § 16-1901 must be overcome prior to obtaining federal habeas review. *Perkins v. Henderson*, 881 F. Supp. 55 (D.D.C. 1995).

District of Columbia prisoners have no recourse to any habeas corpus review unless they can demonstrate that the remedy under this section is "inadequate or ineffective" to test the legality of their detention. *Wilson v. Office of Chairperson*, D.C. Bd. of Parole, 892 F. Supp. 277 (D.D.C. 1995).

This section and 28 U.S.C. § 2255 generally require a prisoner wishing to challenge the lawfulness of custody to file a Motion to Vacate, Correct or Modify his or her sentence. Only if that remedy is somehow inadequate or ineffective to challenge the lawfulness of his or her confinement can a prisoner seek a writ of habeas corpus. *Wilson v. Office of Chairperson*,

D.C. Bd. of Parole, 892 F. Supp. 277 (D.D.C. 1995).

Coram nobis relief distinguished from relief under this section. — Although a prerequisite to collateral relief under this section is that the petitioning defendant be "in custody," there is no converse prerequisite to coram nobis relief that the defendant not be "in custody." *United States v. Hamid*, 113 WLR 2481 (Super. Ct. 1985).

Habeas corpus petition held in abeyance pending application to Court of Appeals. — Where it is unclear what remedy, if any, is available to a petitioner in the courts of the District of Columbia, a federal district court will hold a habeas corpus petition in abeyance pending petitioner's application to the Court of Appeals. *Streater v. Jackson*, 691 F.2d 1026 (D.C. Cir. 1982).

Federal jurisdiction over prisoner challenging transfer between correctional facilities. — Subsection (g) of this section does not oust federal habeas corpus jurisdiction where a prisoner presents no challenge to his sentence but instead claims he was wrongfully transferred from 1 correctional facility to another. *Neal v. Director, D.C. Dep't of Cors.*, 684 F.2d 17 (D.C. Cir. 1982).

Relief not inadequate or ineffective. — For purposes of subsection (g), collateral relief is neither ineffective nor inadequate simply because judges of the Superior Court must be presumed competent to decide all constitutional and other issues that routinely arise in criminal cases. *Swain v. Pressley*, 430 U.S. 372, 97 S. Ct. 1224, 51 L. Ed. 2d 411 (1977).

Where application pursuant to this section remained unanswered for 4 months, the 4 months of near-inactivity warranted a close review of the situation but such delay, without more, did not render the remedy inadequate or ineffective within the meaning of subsection (g) of this section. *Jackson v. Jackson*, 491 F. Supp. 445 (D.D.C. 1980).

Federal jurisdiction over claim of person never convicted. — Subsection (g) did not remove jurisdiction from the Federal courts where habeas corpus relief was sought by a person who was not convicted because a mistrial had been called and his case had never gone to the jury. *Sedgwick v. Superior Court*, 584 F.2d 1044 (D.C. Cir. 1978), cert. denied, 439 U.S. 1075, 99 S. Ct. 849, 59 L. Ed. 2d 42 (1979).

Cited in *Williams v. United States*, App. D.C., 412 A.2d 17 (1980); *Lewis v. United States*, App. D.C., 430 A.2d 528, cert. denied, 454 U.S. 1081, 102 S. Ct. 635, 70 L. Ed. 2d 615 (1981); *Little v. United States*, App. D.C., 438 A.2d 1264 (1981); *Williams v. United States*, App. D.C., 441 A.2d 255, cert. denied, 459 U.S. 916, 103 S. Ct. 230, 74 L. Ed. 2d 182 (1982); *United States v. Donaldson*, App. D.C., 451 A.2d 51 (1982), cert. denied, 464 U.S. 838, 104 S. Ct.

128, 78 L. Ed. 2d 124 (1983); *United States v. Willis*, 110 WLR 929 (Super. Ct. 1982); *White v. Collins*, 110 WLR 2565 (Super. Ct. 1982); *United States v. Hamid*, App. D.C., 461 A.2d 1043 (1983), cert. denied, 464 U.S. 1046, 104 S. Ct. 718, 79 L. Ed. 2d 180 (1984); *Garris v. United States*, App. D.C., 465 A.2d 817 (1983), cert. denied, 465 U.S. 1012, 104 S. Ct. 1013, 79 L. Ed. 2d 243 (1984); *United States v. Venable*, 111 WLR 2241 (Super. Ct. 1983); *Jefferson v. United States*, App. D.C., 474 A.2d 147 (1984); *Miles v. United States*, App. D.C., 483 A.2d 649 (1984); *Allen v. United States*, App. D.C., 495 A.2d 1145 (1985); *Doepel v. United States*, App. D.C., 510 A.2d 1044 (1986); *Townsend v. United States*, App. D.C., 512 A.2d 994 (1986), cert. denied, 481 U.S. 1052, 107 S. Ct. 2188, 95 L. Ed. 2d 843 (1987); *McKoy v. United States*, App. D.C., 518 A.2d 1013 (1986), cert. denied, 485 U.S. 907, 108 S. Ct. 1081, 99 L. Ed. 2d 240 (1988); *Hill v. United States*, App. D.C., 529 A.2d 788 (1987); *Fitzgerald v. United States*, App. D.C., 530 A.2d 1129 (1987); *United States v. Hamid*, App. D.C., 531 A.2d 628 (1987); *Waller v. United States*, App. D.C., 531 A.2d 994 (1987); *Watson v. United States*, App. D.C., 536 A.2d 1056 (1987), cert. denied, 486 U.S. 1010, 108 S. Ct. 1740, 100 L. Ed. 2d 203 (1988); *Scott v. United States*, App. D.C., 559 A.2d 745 (1989); *Luckey v. United States*, App. D.C., 562 A.2d 130 (1989); *Groves v. United States*, App. D.C., 564 A.2d 372 (1989), modified on other grounds, App. D.C., 574 A.2d 265 (1990); *United States v. Shell*, 117 WLR 765 (Super. Ct. 1989); *Robinson v. United States*, App. D.C., 565 A.2d 964 (1989); *Bigelow v. Knight*, 737 F. Supp. 669 (D.D.C. 1990); *Ramos v. United States*, App. D.C., 569 A.2d 158 (1990); *Doughty v. United States*, App. D.C., 574 A.2d 1342 (1990); *Harris v. Harris*, 118 WLR 1977 (Super.

Ct. 1990); *Gordon v. United States*, App. D.C., 582 A.2d 944 (1990); *Holland v. United States*, App. D.C., 584 A.2d 13 (1990); *Boyd v. United States*, App. D.C., 586 A.2d 670 (1991); *Thomas v. United States*, App. D.C., 586 A.2d 1228 (1991); *Caldwell v. United States*, App. D.C., 595 A.2d 961 (1991); *Freeman v. United States*, App. D.C., 600 A.2d 1070 (1991); *Joseph v. United States*, App. D.C., 597 A.2d 14 (1991), cert. denied, 504 U.S. 928, 112 S. Ct. 1988, 118 L. Ed. 2d 585 (1992); *Saleh v. Braxton*, 788 F. Supp. 1232 (D.D.C. 1992); *Moore v. United States*, App. D.C., 608 A.2d 144 (1992), cert. denied, 507 U.S. 935, 113 S. Ct. 1324, 122 L. Ed. 2d 709 (1993); *Gooch v. United States*, App. D.C., 609 A.2d 259 (1992); *Brewer v. United States*, App. D.C., 609 A.2d 1140 (1992), cert. denied, 506 U.S. 1068, 113 S. Ct. 1019, 122 L. Ed. 2d 166 (1993); *Butler v. United States*, App. D.C., 614 A.2d 875, cert. denied, 506 U.S. 1009, 113 S. Ct. 625, 121 L. Ed. 2d 558 (1992); *United States v. Johnson*, 120 WLR 1629 (Super. Ct. 1992); *Jones v. United States*, App. D.C., 620 A.2d 249 (1993); *Hammond v. Weekes*, App. D.C., 621 A.2d 838 (1993), cert. denied, — U.S. —, 114 S. Ct. 707, 126 L. Ed. 2d 673 (1994); *Jackson v. United States*, App. D.C., 626 A.2d 878 (1993); *Matthews v. United States*, App. D.C., 629 A.2d 1185 (1993); *Clement v. District of Columbia Dep't of Human Servs.*, App. D.C., 629 A.2d 1215 (1993); *United States v. Williams*, 121 WLR 2125 (Super. Ct. 1993); *Johnson v. United States*, App. D.C., 631 A.2d 871 (1993); *Stratmon v. United States*, App. D.C., 631 A.2d 1177 (1993); *United States v. Jackson*, 122 WLR 1 (Super. Ct. 1993); *Quallis v. United States*, App. D.C., 654 A.2d 1281 (1995); *Geddie v. United States*, App. D.C., 663 A.2d 531 (1995).

§ 23-111. Proceedings to establish previous convictions.

(a)(1) No person who stands convicted of an offense under the laws of the District of Columbia shall be sentenced to increased punishment by reason of one or more previous convictions, unless prior to trial or before entry of a plea of guilty, the United States attorney or the Corporation Counsel, as the case may be, files an information with the clerk of the court, and serves a copy of such information on the person or counsel for the person, stating in writing the previous convictions to be relied upon. Upon a showing by the Government that facts regarding previous convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years, unless the person either waived or was afforded prosecution by

indictment for the offense for which such increased punishment may be imposed.

(b) If the prosecutor files an information under this section, the court shall, after conviction but before pronouncement of sentence, inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a previous conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c)(1) If the person denies any allegation of the information of previous conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the prosecutor. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the Government to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a) (1). The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the prosecuting authority shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a previous conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d)(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of previous convictions, the court shall proceed to impose sentence upon him as provided by law.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the prosecutor, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by law. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered. (July 29, 1970, 84 Stat. 609, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-111.)

Cross references. — As to increased sentences for previous offenders, see §§ 22-104 and 22-104a.

Section references. — This section is referred to in § 11-721.

Purpose of this section is twofold: (1) To

give notice to the defendant so that he may reasonably assess whether to plead guilty or proceed to trial; and (2) to avoid the "unfairness" of increasing the potential punishment after the trial has begun. *Arnold v. United States*, App. D.C., 443 A.2d 1318 (1982).

Actual notice to the defendant of the prior convictions to be relied upon by the government provides an opportunity prior to trial to consider one's options, and avoids later disputes about the prior convictions on which the government and trial court may properly rely. *Lucas v. United States*, App. D.C., 602 A.2d 1107 (1992).

Sentence under this section is not part of the offense itself. This section comes into play after the trial and after accused has been found guilty, and proceedings thereunder do not involve inquiry into guilt or innocence. *Smith v. United States*, App. D.C., 304 A.2d 28, cert. denied, 414 U.S. 1114, 94 S. Ct. 846, 38 L. Ed. 2d 741 (1973).

Statutory procedure is mandatory. — In imposing a more severe sentence upon conviction where defendant has suffered a prior similar conviction or a prior felony conviction, the mandatory statutory procedure must be followed. *Coleman v. United States*, App. D.C., 295 A.2d 896 (1972).

The procedures of subsection (b) of this section are mandatory, but only before enhanced penalties may be invoked. *Morris v. United States*, App. D.C., 436 A.2d 377 (1981).

Enhanced sentencing involves incarceration for extended periods of time. For that reason, the procedures involved in such augmented sentences must be strictly followed. *Robinson v. United States*, App. D.C., 454 A.2d 810 (1982).

Because enhanced sentencing involves imprisonment for extended periods of time, strict compliance with the procedures set forth in this section is required. *Norman v. United States*, App. D.C., 623 A.2d 1165 (1993).

Limitations period applicable to challenge of sentence imposed in "illegal manner." — Defendant's pro se motion to vacate, set aside, or correct his sentence, citing § 23-110, which claimed that the trial judge failed to strictly comply with the requirements of subsection (b) of this section by not asking him, after his conviction, whether he affirmed or denied any prior convictions should have instead attacked the sentence as one imposed in an "illegal manner" under Superior Court Criminal Rule 35(a) and was therefore subject to the 120-day jurisdictional limitation for challenge. *Norman v. United States*, App. D.C., 623 A.2d 1165 (1993).

And strict compliance is to be followed under this section. *Fields v. United States*, App. D.C., 396 A.2d 990 (1979), cert. denied, 464 U.S. 998, 104 S. Ct. 497, 78 L. Ed. 2d 690 (1983).

Appropriate meaning of "prior to trial" for purposes of subsection (a)(1) of this section is before the court for the first time. *Arnold v. United States*, App. D.C., 443 A.2d 1318 (1982).

Interaction with § 33-541 of the Controlled Substances Act. — Because the D.C. Council created the three-tiered system for recidivists, in the absence of a specific exemption of § 33-541 from the requirements of this section, the court must, if possible, read the two statutes so each is effective. *Lucas v. United States*, App. D.C., 602 A.2d 1107 (1992).

Informations seeking enhanced penalties must be filed before process of selecting jury has started in order to comply with the requirement of filing such informations "prior to trial" as called for by subsection (a)(1) of this section. *Arnold v. United States*, App. D.C., 443 A.2d 1318 (1982).

Failure to comply with subsection (a)(1) following plea agreement. — The Superior Court simply has no authority to impose an enhanced sentence without government compliance with subsection (a)(1) of this section, but where the defendant's sentence resulted from a very specific plea agreement that the defendant thoroughly understood, the Court may vacate defendant's guilty plea and the government may reprosecute him on any and all appropriate charges. *United States v. Short*, 111 WLR 81 (Super. Ct. 1983).

Including requirement for defendant's response. — The requirement that the defendant must affirm that he has been previously convicted as alleged is mandatory. *United States v. Bolden*, 514 F.2d 1301 (D.C. Cir. 1975).

Which requires affirmative statement. — That the defendant must affirm that he has been previously convicted as alleged is mandatory and requires an affirmative statement by the defendant. *United States v. Bolden*, 514 F.2d 1301 (D.C. Cir. 1975).

There is no statutory requirement that defendant be placed under oath to raise issues of proof required by this section, nor is there any statutory requirement that any inquiry of any sort be made of the defendant during the hearing phase of the recidivist sentencing process. *Boswell v. United States*, App. D.C., 511 A.2d 29 (1986).

Defendant's Fifth Amendment rights were violated by trial judge's use as evidence against him his refusal to testify under oath at the sentencing hearing. *Boswell v. United States*, App. D.C., 511 A.2d 29 (1986).

Defendant's substantive rights. — This section requires strict assurance of the defendant's substantive rights, thus, the judge must afford the defendant the opportunity to affirm or deny any alleged past convictions and inform the defendant that the failure to challenge a past conviction prior to sentencing will result in the waiver of any right to such a challenge in

the future. *Logan v. United States*, App. D.C., 591 A.2d 850 (1991).

Resentencing not required. — Where the court has concluded that the purposes of the statute were fulfilled, notwithstanding technical violations, resentencing has not been required. *Logan v. United States*, App. D.C., 591 A.2d 850 (1991).

Requirements of subsection (b) are mandatory and cannot be avoided by merely granting to defendant, whether represented by counsel or not, an opportunity to say something to the court. *Smith v. United States*, App. D.C., 304 A.2d 28, cert. denied, 414 U.S. 1114, 94 S. Ct. 846, 38 L. Ed. 2d 741 (1973).

Defendant can challenge prior convictions at any time before sentencing. *Smith v. United States*, App. D.C., 304 A.2d 28, cert. denied, 414 U.S. 1114, 94 S. Ct. 846, 38 L. Ed. 2d 741 (1973).

Challenge must be raised by response to the information before an increased sentence is imposed. *Smith v. United States*, App. D.C., 304 A.2d 28, cert. denied, 414 U.S. 1114, 94 S. Ct. 846, 38 L. Ed. 2d 741 (1973).

Written response is mandatory. — Statutory procedure for filing a written response is mandatory when possible challenges to prior convictions, sought to enhance punishment, are available. *Smith v. United States*, App. D.C., 304 A.2d 28, cert. denied, 414 U.S. 1114, 94 S. Ct. 846, 38 L. Ed. 2d 741 (1973).

And failure to file written response could violate counsel's duty. — Failure to follow the statutory procedure for filing a written response when challenges are known or should be known could be a violation of counsel's duty to his client. *Smith v. United States*, App. D.C., 304 A.2d 28, cert. denied, 414 U.S. 1114, 94 S. Ct. 846, 38 L. Ed. 2d 741 (1973).

But such failure did not waive right to dispute convictions. — Failure of defendant to file written response to service of notice of prior offense to be used to enhance punishment did not constitute waiver of her right to dispute convictions alleged. *Smith v. United States*, App. D.C., 304 A.2d 28, cert. denied, 414 U.S. 1114, 94 S. Ct. 846, 38 L. Ed. 2d 741 (1973).

Compliance was adequate. — The trial judge complied with the intent and purpose of this section when he addressed appellant directly and afforded him notice and an opportunity to respond, even though it was not clear from the record on appeal whether appellant responded in open court. *Norman v. United States*, App. D.C., 623 A.2d 1165 (1993).

Service of information upon counsel constituted notice to defendant. — Where defendant contended that he was not directly apprised prior to trial of government's intention to seek additional punishment under this section, the notice requirement was met when information was served upon defense counsel

pursuant to this section at status hearing. *Smith v. United States*, App. D.C., 356 A.2d 650 (1976).

Failure to file prior convictions defeated enhanced sentence. — An enhanced sentence could not be imposed upon a defendant where the information as to prior felony convictions was not filed with the clerk of court prior to trial as required by this section. *Bond v. United States*, App. D.C., 310 A.2d 221 (1973).

Court was limited to sentencing defendant as a first offender because the government had not filed enhancement papers. *United States v. Williams*, 116 WLR 1005 (Super. Ct.).

Where government did not file information of prior convictions for enhancement purposes, nor serve the defendant or his counsel, until after the jury had been selected, the enhanced sentence imposed was improper. *Key v. United States*, App. D.C., 587 A.2d 1072 (1991).

As did court's failure to conform to subsection (b). — An enhanced sentence imposed on the defendant, pursuant to § 22-3202, upon his conviction of armed robbery and carrying dangerous weapon, was invalid where the trial court failed to inform the defendant, as required by subsection (b), that he was required to challenge his prior convictions before sentencing or opportunity to do so would be lost. *Smith v. United States*, App. D.C., 356 A.2d 650 (1976).

A trial judge's failure to inquire of defendant whether he affirmed or denied previous convictions contained in government's information invalidates sentence for carrying a pistol without a license. *Irby v. United States*, App. D.C., 342 A.2d 33 (1975).

Notice of prior conviction need not be included in an indictment for offense of carrying pistol without a license to be sentenced as a felony, since fact of a prior conviction is neither an element of the offense charged nor necessary to double jeopardy protection. *Punch v. United States*, App. D.C., 377 A.2d 1353 (1977), cert. denied, 435 U.S. 955, 98 S. Ct. 1586, 55 L. Ed. 2d 806 (1978).

Effect of failure to file recidivist information on sentencing under former § 33-541(c)(2). — A defendant's disqualifying prior conviction precluded sentencing under the addict exception of former § 33-541(c)(2) even where the prosecutor never files a recidivist information. *United States v. Mitchell*, 114 WLR 1257 (Super. Ct.).

Harmless error. — Prosecutor's failure to file informations seeking enhanced punishment prior to the start of the impaneling of the jury constituted harmless error where defendant had notice that enhanced punishment was possible. *Arnold v. United States*, App. D.C., 443 A.2d 1318 (1982).

Incorrect listing in the information of court in which one of defendant's previous convictions

was allegedly obtained was harmless error where the defendant had timely notice of the government's intention to seek enhanced sentencing; the adequacy of notice was clear from defendant's challenge of the convictions; the information correctly stated the date, geographic jurisdiction, case number and nature of the offense; defendant neither denied the existence of the conviction nor that he had been convicted of the offense charged; and defendant made no claim that the misstatement affected his ability to decide how he would proceed in his defense. *Logan v. United States*, App. D.C., 591 A.2d 850 (1991).

Technical violations may constitute harmless error. — The touchstone of judicial compliance with this section is notice to the defendant; however, when such notice is given, technical violations constitute harmless error, and the appellate court will not remand for resentencing. *Norman v. United States*, App. D.C., 623 A.2d 1165 (1993).

Misstatement of the case number for defendant's prior conviction was harmless where the information filed by the government informed defendant of the precise offense date, offense, and court of conviction, and the court discussed with defendant prior to impaneling the jury that this offense could also be used to impeach his testimony. *Parker v. United States*, App. D.C., 654 A.2d 867 (1995).

Motion to vacate sentence properly denied. — Appellate court affirmed denial of defendant's motion to vacate his sentence

where defendant had the notice required by subsection (a)(1), and the trial court acted according to law in imposing an enhanced sentence. *Coleman v. United States*, App. D.C., 628 A.2d 1005 (1993).

Cited in *Kleinbart v. United States*, App. D.C., 388 A.2d 878 (1978); *Scott v. United States*, App. D.C., 392 A.2d 4 (1978); *Ellis v. United States*, App. D.C., 395 A.2d 404 (1978), cert. denied, 442 U.S. 913, 99 S. Ct. 2830, 61 L. Ed. 2d 280 (1979); *Grant v. United States*, App. D.C., 402 A.2d 405 (1979); *Jones v. United States*, App. D.C., 416 A.2d 1236 (1980); *Rogers v. United States*, App. D.C., 419 A.2d 977 (1980); *Tuten v. United States*, App. D.C., 440 A.2d 1008 (1982), aff'd, 460 U.S. 660, 103 S. Ct. 1412, 75 L. Ed. 2d 359 (1983); *Lagon v. United States*, App. D.C., 442 A.2d 166 (1982); *Cornwell v. United States*, App. D.C., 451 A.2d 628 (1982); *Willingham v. United States*, App. D.C., 467 A.2d 742 (1983); *Brown v. United States*, App. D.C., 474 A.2d 161 (1984); *Reed v. United States*, App. D.C., 485 A.2d 613 (1984); *Smith v. United States*, App. D.C., 491 A.2d 1144 (1985); *Bigelow v. United States*, App. D.C., 498 A.2d 210 (1985), dismissed sub nom. *Bigelow v. Knight*, 737 F. Supp. 669 (1990); *Finney v. United States*, App. D.C., 527 A.2d 733 (1987); *Fields v. United States*, App. D.C., 547 A.2d 138 (1988); *Bigelow v. Knight*, 737 F. Supp. 669 (D.D.C. 1990); *In re S.G.*, App. D.C., 581 A.2d 771 (1990); *Bratcher v. United States*, App. D.C., 604 A.2d 858 (1992); *Gilmore v. United States*, App. D.C., 648 A.2d 944 (1994).

§ 23-112. Consecutive and concurrent sentences.

A sentence imposed on a person for conviction of an offense shall, unless the court imposing such sentence expressly provides otherwise, run consecutively to any other sentence imposed on such person for conviction of an offense, whether or not the offense (1) arises out of another transaction, or (2) arises out of the same transaction and requires proof of a fact which the other does not. (July 29, 1970, 84 Stat. 610, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-112.)

Cross references. — As to prohibition of consecutive sentences for theft and certain other crimes, see § 22-3803.

This section is a rule of statutory construction. — It should not be controlling where there is clear indication of contrary legislative intent. *Ball v. United States*, App. D.C., 429 A.2d 1353 (1981).

Preference for consecutive sentences. — This section expresses a statutory preference that consecutive sentences be imposed when an individual is convicted of 2 or more offenses, even if the convictions arise out of the same act or transaction. *Jones v. United States*, App.

D.C., 401 A.2d 473 (1979); *Garris v. United States*, App. D.C., 491 A.2d 511 (1985).

A statutory presumption favors consecutive sentences, even when the convictions arise from the same transaction. *Crawford v. United States*, App. D.C., 628 A.2d 1002 (1993).

Multiple punishments cannot be imposed for 2 offenses arising out of the same criminal transaction unless each offense "requires proof of a fact which the other does not." *Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980).

Test as to whether sentences may run consecutively is whether they are levied for

separate criminal acts. *Banks v. United States*, App. D.C., 307 A.2d 767 (1973).

Where 2 statutory offenses are not the same, the sentences imposed shall, unless the court expressly provides otherwise, run consecutively. *Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980).

Two offenses are separate and distinct when each criminal provision violated requires proof of an additional fact which the other does not. *Jones v. United States*, App. D.C., 401 A.2d 473 (1979); *United States v. Dixon*, 117 WLR 9 (Super. Ct. 1989); *Freeman v. United States*, App. D.C., 600 A.2d 1070 (1991); *Robinson v. United States*, App. D.C., 608 A.2d 115 (1992); *Simms v. United States*, App. D.C., 634 A.2d 442 (1993).

Where 2 statutory provisions proscribe the "same offense," they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent. *Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980).

Concurrent sentences are prescribed when a single act or transaction constitutes 2 criminal offenses, unless the offenses are separate and distinct, and there is a clear legislative intent to provide for consecutive punishment. *Jones v. United States*, App. D.C., 401 A.2d 473 (1979).

A single killing may give rise to convictions for both premeditated murder and felony murder so long as concurrent sentences are imposed. *Harling v. United States*, App. D.C., 460 A.2d 571 (1983).

Consecutive sentences prohibited under § 22-3803. — Section 22-3803 does not prohibit convictions for both receiving stolen property and unauthorized use of a vehicle, but only the imposition of consecutive sentences. *Byrd v. United States*, App. D.C., 598 A.2d 386 (1991).

Congressional guideline for federal court application of cumulative sentences. — The legislative history rather clearly confirms that Congress intended the federal courts to adhere strictly to the rule announced in *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932), for determining whether Congress has in a given situation provided that 2 statutory offenses may be punished cumulatively when construing the penal provisions of the District of Columbia Code. *Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980); *Owens v. United States*, App. D.C., 497 A.2d 1086 (1985), cert. denied, 474 U.S. 1085, 106 S. Ct. 861, 88 L. Ed. 2d 900 (1986).

Assault with a dangerous weapon does not merge with possession of a firearm during crime of violence. — Conviction for assault with a dangerous weapon (§ 22-502) did not merge with later conviction for posses-

sion of a firearm during the commission of a crime of violence (§ 22-3204(b)). *Freeman v. United States*, App. D.C., 600 A.2d 1070 (1991).

Defendant committing single homicide cannot be given consecutive sentences for first degree murder and another homicide crime. *McFadden v. United States*, 395 A.2d 14 (1978).

Imposition of consecutive sentence for felony murder and underlying felonies is prohibited whether the victim of the underlying felony is or is not the same person as the victim of the felony murder since proof of felony murder requires proof of every element of the underlying felony. *Harling v. United States*, App. D.C., 460 A.2d 571 (1983).

Cumulative sentencing for felony murder. — Underlying felony with all of its elements is included within felony murder for purposes of cumulative sentencing. *Harling v. United States*, App. D.C., 460 A.2d 571 (1983).

For purposes of imposing cumulative sentences under this section, the elements of the predicate felony shall be considered additional elements which must be proven in order to establish the offense of felony murder. *Waller v. United States*, App. D.C., 531 A.2d 994 (1987).

Premeditated murder, burglary, and armed robbery are distinct offenses. — While consecutive sentences cannot be imposed for felony murder and the underlying felonies, there is no question that premeditated murder, burglary, and armed robbery are distinct offenses for which consecutive sentences may be imposed. *Harling v. United States*, App. D.C., 460 A.2d 571 (1983).

Premeditated murder and felony murder were not separate offenses within the meaning of this section. *United States v. Ammidown*, 497 F.2d 615 (D.C. Cir. 1973).

Cumulative punishment for felony murder and rape. — Where the offense to be proved does not include proof of a rape, the offense is different from the offense of rape, and cumulative punishments for felony murder and for rape would be permitted. *Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980).

Congress did not authorize consecutive sentences for rape and for a killing committed in the course of the rape. *Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432, 63 L. Ed. 2d 715 (1980).

First degree burglary while armed and robbery while armed are distinct offenses.

— The crimes of burglary in the first degree while armed and robbery while armed are separate and distinct offenses and because each offense requires proof of a fact that the other does not, consecutive sentencing following convictions for both is permissible. *United States v. Venable*, 111 WLR 2241 (Super. Ct.).

Consecutive sentences for armed robbery and assault with intent to kill. — Where, during the course of a robbery, defendant shot one of his robbery victims, and was convicted of both the armed robbery of his victim under §§ 22-2901 and 22-3202 and assault with intent to kill while armed under §§ 22-501 and 22-3202, separate, consecutive sentences for the 2 convictions were not precluded by the merger doctrine. *Taylor v. United States*, App. D.C., 508 A.2d 99 (1986).

Concurrent sentences for armed robbery and felony murder held illegal. — Since a conviction for killing in the course of an armed robbery cannot be had without proving all the elements of the offense of armed robbery, imposition of concurrent sentences of 20 years to life on each separate count of felony murder and armed robbery is illegal as effectively resulting in multiple or cumulative punishment and must be vacated. *Tribble v. United States*, App. D.C., 447 A.2d 766 (1982).

Larceny and false pretenses separate offenses. — Imposition of consecutive sentences upon defendant convicted of 5 counts of grand larceny and 5 counts of false pretenses, who was shown not only to have defrauded complainant but also to have entertained specific intent to steal and who consummated his purpose by later converting funds he received

to his own use, was not beyond trial court's authority since, although offenses arose out of same transaction, one required proof of a fact which the other did not. *Fowler v. United States*, App. D.C., 374 A.2d 856 (1977).

Assault with dangerous weapon and carrying dangerous weapon. — The imposition of consecutive sentences for assault with a dangerous weapon and carrying a dangerous weapon is proper, notwithstanding the fact that the offenses arose out of the same transaction, since the offense of carrying a dangerous weapon requires proof that the weapon was unlicensed while the offense of assault with a dangerous weapon does not. *Hammond v. United States*, App. D.C., 345 A.2d 140 (1975).

Appellate review is limited under this section to assuring that the sentencing court does not exceed its legislative mandate by imposing multiple punishments for the same offense. *Ball v. United States*, App. D.C., 429 A.2d 1353 (1981).

Cited in *Allen v. United States*, App. D.C., 383 A.2d 363 (1978); *Wilson v. United States*, App. D.C., 528 A.2d 876 (1987); *United States v. Dixon*, 117 WLR 9 (Super. Ct. 1989); *Thomas v. United States*, App. D.C., 602 A.2d 647 (1992); *Tyree v. United States*, App. D.C., 629 A.2d 20 (1993); *United States v. Joseph*, 122 WLR 2337 (Super. Ct. 1994).

§ 23-113. Limitations on actions for criminal violations.

(a) *Time limitations.* — (1) A prosecution for murder in the first or second degree may be commenced at any time.

(2) Except as provided in paragraph (4), a prosecution for a felony other than murder in first or second degree is barred if not commenced within six (6) years after it is committed.

(3) Except as provided in paragraph (4), a prosecution for any other criminal offense is barred if not commenced within three (3) years after it is committed.

(4) A prosecution for a felony or a misdemeanor may be brought within three (3) years:

(A) after a public officer or employee has left office, for any completed offense based on official conduct; or

(B) after a fraud or breach of fiduciary trust has been, or reasonably should have been, discovered for any completed offense based on that fraud or breach of fiduciary trust; even if barred by the provisions of paragraphs (2) and (3):

Provided, that, in no case shall this provision extend the period of limitations to more than nine (9) years in the case of a felony nor more than six (6) years in the case of a misdemeanor.

(b) *Time when offense committed.* — An offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct, or the

defendant's complicity therein, is terminated. Time starts to run on the day after the offense is committed or completed.

(c) *Commencement of prosecution.* — A prosecution is commenced when:

- (1) an indictment is entered;
- (2) an information is filed; or

(3) a complaint is filed before a judicial officer empowered to issue an arrest warrant; provided, that such warrant is issued without unreasonable delay. A prosecution for an offense necessarily included in the offense charged shall be considered to have been timely commenced, even though the period of limitation for such included offense has expired, if the period of limitation has not expired for the offense charged and if there was, after the close of the evidence at trial, sufficient evidence as a matter of law to sustain a conviction for the offense charged.

(d) *Suspension of period of limitation.* — The period of limitation for an offense, and any necessarily included offense, does not run during any time when a prosecution against the defendant for that offense is pending in the courts of the District of Columbia.

(e) *Extended period for commencement of new prosecution.* — If a timely complaint, indictment, or information is dismissed for any error, defect, insufficiency, or irregularity, a new prosecution may be commenced within three (3) months after the dismissal becomes final even though the period of limitation has expired at the time of the dismissal or will expire within three (3) months thereafter.

(f) *Fugitives from justice.* — No statute of limitations shall extend to any person fleeing from justice. (Apr. 30, 1982, D.C. Law 4-104, §§ 2, 3, 29 DCR 1401.)

Legislative history of Law 4-104. — Law 4-104, the "District of Columbia Criminal Statute of Limitations Act of 1982," was introduced in Council and assigned Bill No. 4-121, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 9, 1982, and February 23, 1982, respectively. Signed by the Mayor on March 10, 1982, it was assigned Act No. 4-165 and transmitted to both Houses of Congress for its review.

Prisoner's escape from custody. — Violation of the prison breach statute, § 22-2601, constitutes a continuing offense. Thus, the statute of limitations under subsection (b) did not commence to run until the day after the defendant was returned to custody. *Craig v. United States*, App. D.C., 551 A.2d 440 (1988).

Cited in *United States v. Jackson*, App. D.C., 528 A.2d 1211 (1987); *Sumpter v. United States*, App. D.C., 564 A.2d 21 (1989); *In re S.G.*, App. D.C., 581 A.2d 771 (1990).

§ 23-114. Corroboration of a child witness' testimony not required.

For purposes of prosecutions brought under Title 22 of the D.C. Code, independent corroboration of the testimony of a child victim is not required to warrant a conviction. (May 3, 1985, D.C. Law 5-196, § 2(b), 31 DCR 5977.)

Cross references. — As to definition of and penalty for cruelty to children, see § 22-901.

As to sexual performances using minors, see subchapter II of Chapter 20 of Title 22.

As to abducting or enticing children from

home for purposes of prostitution and harboring such children, see § 22-2704.

As to provisions regarding sexual abuse, see Chapter 41 of Title 22.

Legislative history of Law 5-196. — Law

5-196, the "Child Abuse Reform Act of 1984," was introduced in Council and assigned Bill No. 5-426, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on September 12, 1984, and October 23, 1984, respectively. Signed by the Mayor on November 8, 1984, it was assigned Act No. 5-204 and transmitted to both Houses of Congress for its review.

The requirement that the government offer corroboration of a sexual offense victim's testimony has been abolished. *Battle v. United States*, App. D.C., 630 A.2d 211 (1993).

Cited in *Barrera v. United States*, App. D.C., 599 A.2d 1119 (1991); *Moore v. United States*, App. D.C., 609 A.2d 1133 (1992); *United States v. Proctor*, 121 WLR 1889 (Super. Ct. 1993).

CHAPTER 3. INDICTMENTS AND INFORMATIONS.

Subchapter I. General Provisions.

Sec.

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Subchapter I. General Provisions.

§ 23-301. Prosecution by indictment or information.

An offense prosecuted in the Superior Court which may be punished by death shall be prosecuted by indictment returned by a grand jury. An offense which may be punished by imprisonment for a term exceeding one year shall be prosecuted by indictment, but it may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment. Any other offense may be prosecuted by indictment or by information. An information subscribed by the proper prosecuting officer may be filed without leave of court. (July 29, 1970, 84 Stat. 611, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-301.)

Cross references. — As to penalties for unlawful conduct on public passenger vehicles, see § 44-226.

Pendency of indictment does not preclude consideration of others. — The pendency of a grand jury indictment charging assault with a dangerous weapon did not prohibit a 2nd grand jury from considering and returning an indictment charging not only that same count but the additional count of carrying a dangerous weapon, regardless of whether the prior grand jury refused to return a bill charging the latter offense or simply did not consider such an offense. *United States v. Johnson*, App. D.C., 328 A.2d 769 (1974).

Res judicata did not bar subsequent indictment. — A ruling that an original indictment, which charged only that the defendant “stole,” was insufficient because of the failure to allege specific intent to steal is not a decision which went to substance of accusation or defenses to it, and thus does not preclude, under doctrine of res judicata, subsequent grand jury indictment in the same language. *Washington v. United States*, App. D.C., 366 A.2d 457 (1976).

Nor did collateral estoppel. — The dismissal of an original armed robbery indictment, which charged only that defendant “stole,” for failure to charge specific intent to steal is not a

final judgment on the merits. Thus, the doctrine of collateral estoppel does not make the dismissal of the first indictment conclusive as to sufficiency of second indictment which used identical wording. *Washington v. United States*, App. D.C., 366 A.2d 457 (1976).

Dismissal of indictment without prejudice for defense counsel's failure to give required notice of unpreparedness before trial, and for government's unpreparedness at trial as result of defense counsel's telling prosecutor day before trial that defense counsel was going to request continuance, was improper. *United States v. Douglas*, App. D.C., 330 A.2d 243 (1974).

Section 22-1506 prosecutions only by indictment. — Though denominated a misdemeanor by § 22-1506, prescribed penalty of up to 5 years imprisonment made offense of “3-card monte and confidence games” prosecutable only by indictment. *United States v. Brown*, App. D.C., 309 A.2d 256 (1973).

Indictment for threatening to injure person or property of another. — An indictment which follows substantially language of § 22-2307 making it a felony to threaten to injure person and property of another, which particularized the date of offending conduct and stated species of unlawful communication at issue, is sufficient to charge an offense under

that section even though the indictment did not contain the actual words of the alleged threat or allege that threats were made knowingly and intentionally. *United States v. Young*, App. D.C., 376 A.2d 809 (1977).

Where defendant did not assert that indictment was defective, but the court granted his motion to dismiss filed more than 4 months after the preliminary hearing based on errors committed by the hearing and trial

judges, and dismissal was taken as a device to obtain appellate resolution of the case, the dismissal of the indictment was reversible error. *United States v. Davis*, App. D.C., 330 A.2d 751 (1975).

Cited in District of Columbia Metro. Police Dep't v. Broadus, App. D.C., 560 A.2d 501 (1989); *Morrison v. United States*, App. D.C., 579 A.2d 686 (1990).

Subchapter II. Joinder.

§ 23-311. Joinder of offenses and of defendants.

(a) Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Two or more offenses may be charged in the same indictment or information as provided in subsection (a) even though one or more is in violation of the laws of the United States and another is in violation of the laws applicable exclusively to the District of Columbia and may be prosecuted as provided in section 11-502 (3).

(c) Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count. (July 29, 1970, 84 Stat. 611, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-311.)

Cross references. — As to aggregation of theft, fraud, and credit card fraud offenses, see § 22-3802.

Subsection (a) indicates legislative approval of Superior Court Criminal Procedure Rule 8(a). — That the language of Rule 8(a) of the Superior Court Rules of Criminal Procedure is identical to that of subsection (a) of this section indicates explicit legislative approval of the rule. *Winestock v. United States*, App. D.C., 429 A.2d 519 (1981).

There is a presumption favoring joinder of trials. *Bittle v. United States*, App. D.C., 410 A.2d 1383 (1980).

There is a presumption. — There is a strong presumption that two defendants, when charged with jointly committing a criminal offense, will be jointly tried; this presumption may be rebutted where: (1) there are irreconcilable defenses so that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty; (2) one codefendant is seeking to call a codefendant as an exculpatory witness;

or (3) where the evidence against one of the parties is *de minimis*. *Jackson v. United States*, App. D.C., 650 A.2d 659 (1994).

Joinder presents no prejudice to the defendant if evidence of the crimes charged would be admissible in a separate trial for the other offense. *Bittle v. United States*, App. D.C., 410 A.2d 1383 (1980).

Allegations of prejudice for refusal to sever will generally be unpersuasive if the evidence relating to one joined count would be admissible in the separate trial of another. *Wheeler v. United States*, App. D.C., 470 A.2d 761 (1983).

Decision on severance is left to the trial court's discretion. *Bittle v. United States*, App. D.C., 410 A.2d 1383 (1980).

And severance will be disturbed only if discretion abused. — The Court of Appeals will disturb a decision of a trial court concerning severing counts of an indictment only if there has been an abuse of discretion. *Bittle v. United States*, App. D.C., 410 A.2d 1383 (1980).

The D.C. Court of Appeals will reverse the

denial of a motion for severance only upon a clear showing that the broad discretion accorded the trial court in this regard has been abused. *Brooks v. United States*, App. D.C., 448 A.2d 253 (1982).

In ruling on the trial court's refusal to sever, the Court of Appeals may reverse only for a clear abuse of discretion. *Wheeler v. United States*, App. D.C., 470 A.2d 761 (1983).

In deciding whether to sever, the trial judge must balance the possibility of prejudice to the defendants against the legitimate probative force of the interest in judicial economy. *Bittle v. United States*, App. D.C., 410 A.2d 1383 (1980).

A defendant may move, under SCR-Criminal 14, to sever joined counts if he establishes that such joinder presents the most compelling prejudice, when balanced against the strong social policy to conserve state funds, limit inconvenience, and avoid delay. *Wheeler v. United States*, App. D.C., 470 A.2d 761 (1983).

Subsection (c) of this section codifies Rule 8(b) of the Superior Court Rules of Criminal Procedure, which is identical to Rule 8(b) of the Federal Rules of Criminal Procedure. *Sousa v. United States*, App. D.C., 400 A.2d 1036, cert. denied, 444 U.S. 981, 100 S. Ct. 484, 62 L. Ed. 2d 408 (1979).

Refusal to sever not clearly erroneous. *Wheeler v. United States*, App. D.C., 470 A.2d 761 (1983).

Joined offenses need not be identical in every detail. *Brooks v. United States*, App. D.C., 448 A.2d 253 (1982).

Risk of prejudice when offenses of similar character joined for trial. — When offenses of a "similar character" are joined at trial there is a substantial risk of prejudice. *Evans v. United States*, App. D.C., 392 A.2d 1015 (1978).

Joinder permitted where offenses similar, evidence distinct, and jury clearly instructed. — The trial court did not abuse its discretion in refusing to require a separate trial of 2 offenses in light of the facts that the offenses were similar in character, that evidence of the 2 crimes was simple and distinct and that the jury was clearly instructed as to each. *Roldan v. United States*, App. D.C., 353 A.2d 292 (1976).

Joinder permitted where evidence separate and distinct or would be admissible at severed trials. — It is proper to deny a motion to sever where: (1) The evidence as to each offense is separate and distinct, and thus unlikely to be amalgamated in the jury's mind into a single inculpatory mass; or (2) the evidence of each of the joined crimes would be admissible at the separate trial of the others. *Brooks v. United States*, App. D.C., 448 A.2d 253 (1982).

Offenses against federal and local statutes properly charged in same indictment.

— The government may properly charge in the same indictment offenses against both the federal bank robbery statute and the local armed robbery statute, provided defendant is not ultimately sentenced under 2 statutes proscribing essentially the same offense. *United States v. Shepard*, 515 F.2d 1324 (D.C. Cir. 1975).

But prosecution's election of theory remedied infirmities of duplicitous indictment. — After the government's election to proceed only on the theory of involuntary manslaughter under duplicitous indictment which failed to distinguish between voluntary and involuntary manslaughter, trial suffered none of infirmities associated with one based upon duplicitous indictment. *Murray v. United States*, App. D.C., 358 A.2d 314 (1976).

Each count of indictment directed to different facet of occurrence. — The joinder in an indictment of counts charging both defendants with assault with a dangerous weapon and charging each defendant respectively with possession of a pistol without a license was proper, since each count was directed to a different facet of 1 continuous occurrence, and thus constituted a "series of acts" within the meaning of subsection (c). *Barker v. United States*, App. D.C., 373 A.2d 1215 (1977).

Offenses unrelated in place but closely related in time. — Where robbery and felony murder, although unrelated as to place, were so closely related in time as to almost constitute a continuing transaction and evidence of robbery would have been admissible in separate trial for felony murder to show motive, intent, absence of accident and common scheme or plan to rob, the trial court did not abuse its discretion in denying severance of robbery and felony murder counts. *Calhoun v. United States*, App. D.C., 369 A.2d 605 (1977).

Methods employed in each offense strikingly similar. — The trial court in prosecution of defendant for 2 rapes did not abuse its discretion in denying severance of 1 rape count from another where, while 2 rapes occurred at different times, methods employed by rapist in each case were strikingly similar. *Arnold v. United States*, App. D.C., 358 A.2d 335 (1976), modified on other grounds, *Gary v. United States*, App. D.C., 499 A.2d 815 (1985), cert. denied, sub nom. *Cole v. United States*, 475 U.S. 1086, 106 S. Ct. 1470, 89 L. Ed. 2d 725, cert. denied, 477 U.S. 906, 106 S. Ct. 3279, 91 L. Ed. 2d 568 (1986).

Similar circumstances common to all offenses. — Although there was no 1 unique characteristic common to 4 rape offenses, the circumstances common to 4 offenses are sufficiently similar that denial of motion to sever offenses was not abuse of discretion. *Bridges v. United States*, App. D.C., 381 A.2d 1073 (1977), cert. denied, 439 U.S. 842, 99 S. Ct. 135, 58 L. Ed. 2d 141 (1978).

Similar characteristics too speculative to permit joinder for trial. — Any characteristics of possible similarity between two burglary offenses were too speculative to identify with sufficient certainty the defendant as a perpetrator of both of the crimes, and therefore the offenses should have been severed for trial. *Evans v. United States*, App. D.C., 392 A.2d 1015 (1978).

Assertions of commonality in offenses left identification of defendant speculative. — Under circumstances including, that crimes occurred almost 6 months apart, were distant in location and no motive was shown for either homicide, a joint trial, under indictment charging 2 counts of second degree murder, was erroneous, since asserted factors of commonality left question of identity to speculation and probative value of factors did not outweigh prejudice, where there was no concurrence of unusual or distinctive facts relating to manner in which crimes were committed as would justify a rational conclusion that defendant, to exclusion of others, was killer and potential misuse of evidence by jury was apparent. *Tinsley v. United States*, App. D.C., 368 A.2d 531 (1976).

Joinder of charges arising from 3 separate armed robberies was proper where the evidence for each of the crimes was relevant to establish common scheme and plan and went to issue of identity, the evidence as to each crime was clearly separable and distinct and not likely to cause confusion, and there was no showing that any prejudice resulted from refusing to grant severance. *United States v. Miller*, 449 F.2d 974 (D.C. Cir. 1970).

Joinder of two armed robbery offenses that occurred 10 days apart, both involving the same restaurant and its manager, was proper, and certainly not plain error. *Fields v. United States*, App. D.C., 484 A.2d 570 (1984), cert. denied, 471 U.S. 1067, 105 S. Ct. 2144, 85 L. Ed. 2d 501 (1985).

Severance issue should be raised at trial. — A defendant, who contended on appeal that the trial court erred in refusing to sever for trial 7 offenses and 39 counts contained in the indictment because cumulative effect of evidence introduced to prove all counts made fair trial impossible and that trial court's failure to sever such counts deprived him of his rights to a fair trial, who made no motions for severance either before or during trial nor did he join in codefendant's motion for severance, and who was aware of all facts comprising his claim of prejudice before trial, should have raised such issue at trial rather than on appeal. *Davis v. United States*, App. D.C., 367 A.2d 1254 (1976), cert. denied, 434 U.S. 847, 98 S. Ct. 154, 54 L. Ed. 2d 114 (1977).

Joinder of misdemeanor and felony defendants. — The joinder of defendants, one

charged with a misdemeanor and the other with a felony in connection with carrying a deadly weapon, could be accomplished by filing an information against the former and, upon indictment of his codefendant, moving for joinder. *Freeman v. Smith*, App. D.C., 301 A.2d 217 (1973).

Prosecution of juveniles. — Where the prosecution of a juvenile in the juvenile court proceeded before a judge without a jury, the court did not commit reversible error when it refused to grant the juvenile separate trial after hearing witness testify that juvenile's correspondent had implicated him in correspondent's statements about burglary for which juvenile was being tried. In re *L.J.W.*, App. D.C., 370 A.2d 1333 (1977).

Probative value of evidence outweighed prejudice resulting from joinder. — Even assuming that the defendant and a codefendant had antagonistic defenses to armed robbery charges, where independent evidence of the defendant's guilt was overwhelming and defendant did not demonstrate that the alleged conflict in defenses in itself created a danger that the jury would unjustifiably infer defendant's guilt, any possible prejudice which may have resulted from joint trial was not such as to warrant reversal. *Clark v. United States*, App. D.C., 367 A.2d 158 (1976).

Reciprocal admissibility may be found where evidence of separate crimes is relevant to proof of motive, intent, absence of mistake, existence of a common scheme or plan, or identity. *Brooks v. United States*, App. D.C., 448 A.2d 253 (1982).

"Other crimes" evidence is admissible on issue of identity when circumstances surrounding each crime demonstrate that there is a reasonable probability that the same person committed both due to the concurrence of unusual and distinctive facts relating to the manner in which the crimes were committed. *Brooks v. United States*, App. D.C., 448 A.2d 253 (1982).

Thus, trial court did not abuse discretion in denying severance where the record showed that the evidence of each assault involved would have been admissible as to the identity of the perpetrator at a separate trial of the other incident and that joinder did not work undue prejudice to appellant. *Brooks v. United States*, App. D.C., 448 A.2d 253 (1982).

Taking into account overall considerations of judicial economy, trial judge did not abuse her discretion in denying severance, though 1 defendant contended that the other placed upon him chief responsibility for the crimes. *United States v. Caldwell*, 543 F.2d 1333 (D.C. Cir. 1974), cert. denied, 423 U.S. 1087, 96 S. Ct. 877, 47 L. Ed. 2d 97 (1976).

Refusal to sever not an abuse of discretion. — Trial judge did not abuse his discretion

in refusing to sever defendant's trial from the codefendant's trial after her codefendant's absence halfway through the trial. *Russell v. United States*, App. D.C., 586 A.2d 695 (1991).

The trial judge did not abuse his discretion in refusing to sever the Bail Reform Act charge from the other charges since the defendant's failure to appear for trial would have been admissible at a separate trial for the murder, robbery, and burglary charges. *Russell v. United States*, App. D.C., 586 A.2d 695 (1991).

In a prosecution of 2 defendants charged in a 44-count indictment with kidnapping while armed, armed robbery, and armed rape, reversible error resulted as to 1 defendant from joinder of counts charging such defendant and co-defendant jointly with counts charging co-defendant alone and with others unidentified, where proof of each crime did not overlap and there was no economy and efficiency served by such joinder, and where testimony could lead to jury inference that defendant was in fact unidentified person. *Davis v. United States*, App. D.C., 367 A.2d 1254 (1976), cert. denied, 434 U.S. 847, 98 S. Ct. 154, 54 L. Ed. 2d 114 (1977).

Crimes were appropriately joined in the

same indictment. *United States v. Peoples*, 116 WLR 1161 (Super. Ct. 1988).

Severance was appropriate. — Inflammatory nature of offenses, coupled with the court's inability to assess before trial whether intent would be a "material or genuine" issue, necessitated severance of the first two counts from the remaining counts of the indictment. *United States v. Peoples*, 116 WLR 1161 (Super. Ct. 1988).

Review for plain error if no objection. — Where defendant made no objection to the joinder of offenses in the trial court, and in fact stated that he objected to a motion for severance filed by his codefendants, the appellate court may review the joinder claim at most for plain error. *Fields v. United States*, App. D.C., 484 A.2d 570 (1984), cert. denied, 471 U.S. 1067, 105 S. Ct. 2144, 85 L. Ed. 2d 501 (1985).

Cited in *Strickland v. United States*, App. D.C., 389 A.2d 1325 (1978), cert. denied, 440 U.S. 926, 99 S. Ct. 1258, 59 L. Ed. 2d 481 (1979); *Hackney v. United States*, App. D.C., 389 A.2d 1336 (1978), cert. denied, 439 U.S. 1132, 99 S. Ct. 1054, 59 L. Ed. 2d 95 (1979); *Thorne v. United States*, App. D.C., 582 A.2d 964 (1990).

§ 23-312. Joinder of indictments or informations for trial.

The court may order two or more indictments or informations, or both, to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information. (July 29, 1970, 84 Stat. 611, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-312.)

Failure to order severance sua sponte not error. — Where defendant himself moved for joinder of indictments, did not object to admission of evidence of other crimes at trial for strategic reasons in order to prove defense of insanity, where much of evidence of other

crimes would have been introduced regardless of joinder, and where possibility of prejudice was not enlarged by factor of joinder alone, trial court's failure to order a severance, sua sponte, was not plain error requiring reversal. *Bell v. United States*, App. D.C., 332 A.2d 351 (1975).

§ 23-313. Relief from prejudicial joinder.

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants, or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial. (July 29, 1970, 84 Stat. 611, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-313.)

This section codifies Superior Court Criminal Procedure Rule 14. *Carpenter v. United States*, App. D.C., 430 A.2d 496, cert. denied, 454 U.S. 852, 102 S. Ct. 295, 70 L. Ed. 2d 143 (1981).

There is a presumption favoring joinder of trials. *Bittle v. United States*, App. D.C., 410 A.2d 1383 (1980).

Joinder presents no prejudice to the defendant if evidence of the crimes charged would be admissible in a separate trial for the other offense. *Bittle v. United States*, App. D.C., 410 A.2d 1383 (1980).

Decision on severance is left to the trial court's discretion. *Bittle v. United States*, App. D.C., 410 A.2d 1383 (1980).

And severance will be disturbed only if discretion abused. — The Court of Appeals will disturb a decision of a trial court concerning severing counts of an indictment only if there has been an abuse of discretion. *Bittle v. United States*, App. D.C., 410 A.2d 1383 (1980).

In deciding whether to sever, the trial judge must balance the possibility of prejudice to the defendants against the legitimate probative force of the interest in judicial economy. *Bittle v. United States*, App. D.C., 410 A.2d 1383 (1980).

Critical factor in determining merits of severance motion is the prejudice to the movant. *Warren v. United States*, App. D.C., 436 A.2d 821 (1981).

Risk of prejudice when offenses of similar character joined for trial. — When offenses of a "similar character" are joined at trial there is a substantial risk of prejudice. *Evans v. United States*, App. D.C., 392 A.2d 1015 (1978).

So that severance should be granted absent special circumstances. — When joinder of offenses is based on the fact that the crimes are of a "similar character," a motion to sever should be granted unless (1) the evidence as to each offense is separate and distinct and thus unlikely to be amalgamated in the jury's mind into a single inculpatory mass or (2) the evidence of each of the joined crimes would be admissible at the separate trial of the others. *Evans v. United States*, App. D.C., 392 A.2d 1015 (1978).

Joinder of offenses permitted in cases of identity-type reciprocal admissibility. — Identity-type reciprocal admissibility, in so-called signature crimes, permits joinder where the offenses are so nearly identical in method because of a concurrence of unusual and distinctive characteristics that it is likely that they were committed by the same person. *Warren v. United States*, App. D.C., 436 A.2d 821 (1981).

Criteria which satisfy test of reciprocal admissibility. — The test of reciprocal admissibility is satisfied where evidence of each of the joined offenses would be admissible at the trial

of the others as relevant to showing the identity of the person charged with the commission of the crime on trial. *Warren v. United States*, App. D.C., 436 A.2d 821 (1981).

The reciprocal admissibility test is satisfied where evidence of each of the joined offenses would be relevant to prove motive, intent, absence of mistake or accident, or a common scheme or plan. *Warren v. United States*, App. D.C., 436 A.2d 821 (1981).

Characteristics of possible similarity between 2 burglary offenses were too speculative to identify with sufficient certainty the defendant as a perpetrator of both of the crimes, and therefore the offenses should have been severed for trial. *Evans v. United States*, App. D.C., 392 A.2d 1015 (1978).

Residual potential for prejudice was outweighed by economy and efficiency interests in trying 2 counts of robbery together, for evidence of the second robbery would have been fully admissible in a separate trial of the first even though evidence of the first robbery would have been only partially admissible in a separate trial of the 2nd. *Samuels v. United States*, App. D.C., 385 A.2d 16 (1978).

Defendant appealing prejudicial joinder must show clear abuse of discretion. — To convince an appellate court that he has been prejudiced by joinder, a defendant must demonstrate a clear abuse of discretion by the trial court, and no such abuse can be found unless it appears (1) that the jury may have cumulated evidence of separate crimes to find guilt, (2) that the jury may have improperly inferred a criminal disposition and treated the inference as evidence of guilt or (3) that the defendant may have become embarrassed or confounded in presenting defenses to different charges. *Strickland v. United States*, App. D.C., 389 A.2d 1325 (1978), cert. denied, 440 U.S. 926, 99 S. Ct. 1258, 59 L. Ed. 2d 481 (1979).

Trial court did not err in denying motion to sever the counts of an indictment involving 1 murder, about which the defendant wished to testify, from those charging him with 3 other related murders. *Strickland v. United States*, App. D.C., 389 A.2d 1325 (1978), cert. denied, 440 U.S. 926, 99 S. Ct. 1258, 59 L. Ed. 2d 481 (1979).

Trial court's refusal to sever 3 homicide counts was proper where evidence of all the charges against the defendant would have been mutually admissible at each of the separate trials had the severance motion been granted and where the evidence showed the existence of a common scheme or plan. *Hackney v. United States*, App. D.C., 389 A.2d 1336 (1978), cert. denied, 439 U.S. 1132, 99 S. Ct. 1054, 59 L. Ed. 2d 95 (1979).

Resolution of severance motion at retrial not dictated by res judicata. — Where a severance motion at retrial presents a new

question of prejudice, its resolution is not dictated by res judicata or the law of the case doctrine. *Warren v. United States*, App. D.C., 436 A.2d 821 (1981).

Cited in *Grant v. United States*, App. D.C.,

402 A.2d 405 (1979); *Winestock v. United States*, App. D.C., 429 A.2d 519 (1981); *United States v. Brace*, 117 WLR 2413 (Super. Ct. 1989).

§ 23-314. Joinder of inconsistent offenses concerning the same property.

Repealed. Dec. 1, 1982, D.C. Law 4-164, § 602(a), 29 DCR 3976.

Legislative history of Law 4-164. — Law 4-164, the “District of Columbia Theft and White Collar Crimes Act of 1982,” was introduced in Council and assigned Bill No. 4-133, which was referred to the Committee on the Judiciary. The Bill was adopted on first,

amended first and second reading on June 22, 1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned act No. 4-238 and transmitted to both Houses of Congress for its review.

Subchapter III. Sufficiency.

§ 23-321. Description of money.

In every indictment or information, except for forgery, in which it is necessary to make an averment as to any money or bank bill or notes, United States Treasury notes, postal and fractional currency, or other bills, bonds, or notes, issued by lawful authority and intended to pass and circulate as money, it shall be sufficient to describe such money, bills, notes, currency, or bonds simply as money, without specifying any particular coin, note, bill, or bond; and such allegation shall be sustained by proof that the accused has stolen or embezzled any amount of coin, or any such note, bill, currency, or bond, although the particular amount or species of such coin, note, bill, currency, or bond be not proved. (July 29, 1970, 84 Stat. 612, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-321.)

§ 23-322. Intent to defraud.

In an indictment or information in which it is necessary to allege an intent to defraud, it shall be sufficient to allege that the party accused did the act complained of with intent to defraud, without alleging an intent to defraud any particular person or body corporate. On the trial of such an indictment or information it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove a general intent to defraud. (July 29, 1970, 84 Stat. 612, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-322.)

Cross references. — As to fraud, see § 22-3821.

As to forgery, see § 22-3841.

§ 23-323. Perjury.

In every information or indictment for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what

court, or before whom the oath was taken (averring such court, or person or persons, to have a competent authority to administer the same) together with the proper averment or averments to falsify the matter or matters wherein the perjury or perjuries is or are assigned; without setting forth the bill, answer, information, indictment, declaration, or any part of any record of proceeding either in law or equity, other than as aforesaid; and without setting forth the commission or authority of the court, or person or persons before whom the perjury was committed; any law, usage, or custom to the contrary notwithstanding. (July 29, 1970, 84 Stat. 612, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-323.)

Section is purely procedural. *Hsu v. United States*, App. D.C., 392 A.2d 972 (1978).

Compliance with this section and court rule satisfies constitutional criteria. — Compliance with Rule 7(c) of the Superior Court Rules of Criminal Procedure and this section satisfies the constitutional criteria of *Russell v. United States*, 369 U.S. 749, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962), which provided that an indictment must contain all the elements of the offense charged, must sufficiently apprise the defendant of the charges so that he can prepare to meet them and must be clear enough, when coupled with the record of the proceedings, to preclude double jeopardy. *Hsu v. United States*, App. D.C., 392 A.2d 972 (1978).

Section does not modify rule's balance between specificity and conciseness. — Court rejected the argument that when the government indicts for perjury, this section modifies the balance struck between specificity and conciseness in Rule 7(c) of the Superior Court Rules of Criminal Procedure, governing the form of indictments. *Hsu v. United States*, App. D.C., 392 A.2d 972 (1978).

Section and rule require same allegations of falsity. — As to the allegations of falsity required for a valid perjury indictment, the procedural requirements of this section and Rule 7(c) of the Superior Court Rules of Criminal Procedure are the same. *Hsu v. United States*, App. D.C., 392 A.2d 972 (1978).

Perjury indictment must allege falsity. *Hsu v. United States*, App. D.C., 392 A.2d 972 (1978).

Indictment clearly charged making of false statements. — Where an indictment in

language similar to the perjury statute charged that the defendant "having taken an oath that he would testify truly, did unlawfully, wilfully, knowingly and contrary to such oath, state material matters which he did not believe to be true," this language clearly charged appellant with making false statements, i.e., he took an oath to testify truthfully and did not do so. *Hsu v. United States*, App. D.C., 392 A.2d 972 (1978).

And sufficed to inform defendant of charge. — Where in addition to repeating the statutory language the indictment referred to the defendant's oath before the judge and further specified the question and offending answer he allegedly gave, this sufficed to inform the defendant of the alleged falsity. *Hsu v. United States*, App. D.C., 392 A.2d 972 (1978).

Simple allegation as to materiality did not render indictment deficient for lack of specificity. *Hsu v. United States*, App. D.C., 392 A.2d 972 (1978).

Alleged perjury material despite testimony admitting partial falsehood. — Even if the defendant's acknowledgment set forth in his perjury indictment, that he had learned about a temporary restraining order prior to the date set for hearing on the order to show cause, had constituted an admission of contempt for failure to comply with an order actually received, that admission would not necessarily negate the materiality of his denial of service of the restraining order, which related to his contumacy between service and the admitted receipt of notice and was the gravamen of the perjury indictment. *Hsu v. United States*, App. D.C., 392 A.2d 972 (1978).

§ 23-324. Subordination [Subornation] of perjury.

In every information or indictment for subornation of perjury, or for corrupt bargaining or contracting with others to commit perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding either in law or equity, and without setting forth the commission or authority of the court, or person or persons before whom the

perjury was committed, or was agreed or promised to be committed, any law, usage, or custom to the contrary notwithstanding. (July 29, 1970, 84 Stat. 612, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-324.)

Editor's notes. — In the catchline to this section, "subornation" was inserted in brackets to correct a misspelling.

CHAPTER 5. WARRANTS AND ARRESTS.

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Subchapter I. Definitions.

§ 23-501. Definitions.

As used in subchapters II, IV, and V of this chapter —

(1) The term “judicial officer” means a judge of the Superior Court of the District of Columbia or of the United States District Court for the District of Columbia, or a United States commissioner or magistrate for the District of Columbia.

(2) The term “law enforcement officer” means an officer or member of the Metropolitan Police Department of the District of Columbia, or of any other police force operating in the District of Columbia, or an investigative officer or agent of the United States, or animal control officer employed by the District of Columbia.

(3) The term “prosecutor” means the United States Attorney for the District of Columbia or his assistant, the Corporation Counsel of the District of Columbia or his assistant, or an attorney employed by, and who has entered an appearance on behalf of, the United States or the District of Columbia in a

criminal case or in an investigation being conducted by a grand jury. (July 29, 1970, 84 Stat. 613, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-501; Oct. 18, 1988, D.C. Law 7-176, § 9(b), 35 DCR 4787.)

Legislative history of Law 7-176. — Law 7-176, the “Dangerous Dog Amendment Act of 1988,” was introduced in Council and assigned Bill No. 7-276, which was referred to the Committee on Human Services. The Bill was adopted on first and second readings on May 17, 1988 and May 31, 1988, respectively. Signed by the Mayor on June 9, 1988, it was assigned Act No. 7-190 and transmitted to both Houses of Congress for its review.

Deputy U.S. Marshal assigned to courtroom security detail was law enforcement officer within the meaning of this section. *Lucas v. United States*, 443 F. Supp. 539 (D.D.C. 1977), *aff’d*, 590 F.2d 356 (D.C. Cir. 1979).

Cited in *United States v. Boettcher*, 588 F.2d 89 (4th Cir. 1978); *United States v. Alatishe*, 616 F. Supp. 1406 (D.D.C. 1985); *United States v. Laws*, 808 F.2d 92 (D.C. Cir. 1986).

Subchapter II. Search Warrants.

§ 23-521. Nature and issuance of search warrants.

(a) Under circumstances described in this subchapter, a judicial officer may issue a search warrant upon application of a law enforcement officer or prosecutor. A warrant may authorize a search to be conducted anywhere in the District of Columbia and may be executed pursuant to its terms.

(b) A search warrant may direct a search of any or all of the following:

- (1) one or more designated or described places or premises;
- (2) one or more designated or described vehicles;
- (3) one or more designated or described physical objects; or
- (4) designated persons.

(c) A search warrant may direct the seizure of designated property or kinds of property, and the seizure may include, to such extent as is reasonable under all the circumstances, taking physical or other impressions, or performing chemical, scientific, or other tests or experiments of, from, or upon designated premises, vehicles, or objects.

(d) Property is subject to seizure pursuant to a search warrant if there is probable cause to believe that it —

- (1) is stolen or embezzled;
- (2) is contraband or otherwise illegally possessed;
- (3) has been used or is possessed for the purpose of being used, or is designed or intended to be used, to commit or conceal the commission of a criminal offense; or

(4) constitutes evidence of or tends to demonstrate the commission of an offense or the identity of a person participating in the commission of an offense.

(e) A search warrant may be addressed to a specific law enforcement officer or to any classification of officers of the Metropolitan Police Department of the District of Columbia or other agency authorized to make arrests or execute process in the District of Columbia.

(f) A search warrant shall contain —

- (1) the name of the issuing court, the name and signature of the issuing judicial officer, and the date of issuance;
- (2) if the warrant is addressed to a specific officer, the name of that officer, otherwise, the classifications of officers to whom the warrant is addressed;

(3) a designation of the premises, vehicles, objects, or persons to be searched, sufficient for certainty of identification;

(4) a description of the property whose seizure is the object of the warrant;

(5) a direction that the warrant be executed during the hours of daylight or, where the judicial officers have found cause therefor, including one of the grounds set forth in section 23-522 (c) (1), and authorization for execution at any time of day or night; and

(6) a direction that the warrant and an inventory of any property seized pursuant thereto be returned to the court on the next court day after its execution. (July 29, 1970, 84 Stat. 614, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-521; Oct. 26, 1974, 88 Stat. 1455, Pub. L. 93-481, § 4(b); Apr. 30, 1988, D.C. Law 7-104, § 7(a), 35 DCR 147.)

Cross references. — As to authorization of searches in gaming houses or bawdy houses, see § 4-145.

As to examination of books and search of premises of certain businesses, see § 4-148.

As to examination of pawned or pledged property, see § 4-149.

As to warrantless searches by Director of Weights, Measures, and Markets, see § 10-128.

As to search warrants in prevention of cruelty to animals, see § 22-805.

As to prohibition of advance information of raids to attorneys or bondsmen, see § 23-1109.

As to search warrants under Alcoholic Beverage Control Act, see § 25-129.

As to search warrants under Uniform Narcotic Drug Act, see § 33-514.

As to search warrants to discover illegal use of milk containers, see §§ 48-205 and 48-305.

Section references. — This section is referred to in §§ 23-522, 23-523 and 23-524.

Legislative history of Law 7-104. — Law 7-104, the "Technical Amendments Act of 1987," was introduced in Council and assigned Bill No. 7-346, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 24, 1987 and December 8, 1987, respectively. Signed by the Mayor on December 22, 1987, it was assigned Act No. 7-124 and transmitted to both Houses of Congress for its review.

Search warrant provision counterpart to federal rules. — The general provision relating to search warrants found in the District of Columbia Code and incorporated in similar form into the Superior Court Rules of Criminal Procedure was intended to be a counterpart to the comparable Federal Rules of Criminal Procedure. *Gooding v. United States*, 416 U.S. 430, 94 S. Ct. 1780, 40 L. Ed. 2d 250 (1974).

This section is applicable to search warrants issued in connection with federal offenses. *United States v. Gooding*, 328 F. Supp. 1005 (D.D.C. 1971), rev'd on other

grounds, 477 F.2d 428 (D.C. Cir. 1973), aff'd, 416 U.S. 430, 94 S. Ct. 1780, 40 L. Ed. 2d 250 (1974).

Restrictions upon issuance of nighttime search warrant. — In the absence of a showing that a search warrant cannot be executed during the day or that evidence allegedly in a vehicle to be searched is likely to be removed unless seized forthwith or would be in the vehicle only at certain times of day, allegations do not support issuance of nighttime search warrant. *Spence v. United States*, App. D.C., 370 A.2d 1351 (1977).

Laws dealing with narcotics and drugs control over general search warrant provisions of the United States and District of Columbia Codes. *United States v. Thomas*, App. D.C., 294 A.2d 164, cert. denied, 409 U.S. 992, 93 S. Ct. 341, 34 L. Ed. 2d 258 (1972).

And qualify restrictions on nighttime searches. — The District of Columbia narcotics statute providing that "the judge or commissioner shall insert a direction in the warrant that it may be served at any time in the day or night", qualifies §§ 23-521 to 23-523 permitting a nighttime execution of the search warrant if, and only if, there is an express authorization therefore pursuant to statute. *United States v. Green*, 331 F. Supp. 44 (D.D.C. 1971).

Search warrant affidavit reciting an uncorroborated tip together with investigative officers' observations of comings and goings and delivery of small package, all in accordance with officers' knowledge of the operation of a numbers game, was sufficient to support warrant for search where affidavit recited that participants had gambling law convictions and that premises had been established by police records to have recently housed gambling operation. *United States v. Berry*, 463 F.2d 1278 (D.C. Cir. 1972).

Failure of search warrant affidavit to set forth factual circumstances from which a magistrate could appraise the informant's credibility and to state the circumstances upon

which an informant based his conclusion was not fatal where, according to affidavits, the information triggered investigation by officers who set out the details and results of their investigation. *United States v. Berry*, 463 F.2d 1278 (D.C. Cir. 1972).

Search of purse inside apartment. — Where a search warrant authorized officers to search an entire apartment for narcotics, an apartment visitor's purse which was sitting on table could properly be searched in pursuit of items for which warrant had issued. *United States v. Johnson*, 475 F.2d 977 (D.C. Cir. 1973).

Search of back room accessible only through premises. — A warrant for the search of premises at a designated street address was sufficient to include the back room of the identified shop, which could be entered only through the shop itself. *Short v. District of Columbia*, App. D.C., 300 A.2d 450 (1973).

Surgical removal of objects from nonconsenting suspect's body. — This sec-

tion is broad enough to support a ruling that objects, believed to be bullets shot at an assailant during a robbery, be surgically removed from a nonconsenting suspect's body. *Hughes v. United States*, App. D.C., 429 A.2d 1339 (1981).

Blood testing for HIV retrovirus. — Defendant charged with rape may not be required to submit blood sample to be tested for HIV retrovirus. *United States v. Garmon*, 120 WLR 105 (Super. Ct. 1992).

Superior Court judge has jurisdiction to issue search warrant to United States Park Police based upon the District of Columbia Uniform Controlled Substances Act. *United States v. Alatishe*, 616 F. Supp. 1406 (D.D.C. 1985) (search in residential neighborhood).

Cited in *Hines v. United States*, App. D.C., 442 A.2d 146 (1982); *United States v. Laws*, 808 F.2d 92 (D.C. Cir. 1986); *United States v. Edelen*, App. D.C., 529 A.2d 774 (1987); *United States v. Halliman*, 923 F.2d 873 (D.C. Cir. 1991).

§ 23-522. Applications for search warrants.

(a) Each application for a search warrant shall be made in writing upon oath or affirmation to a judicial officer.

(b) Each application shall include —

(1) the name and title of the applicant;

(2) a statement that there is probable cause to believe that property of a kind or character described in section 23-521 (d) is likely to be found in a designated premise, in a designated vehicle or object, or upon designated persons;

(3) allegations of fact supporting such statement; and

(4) a request that the judicial officer issue a search warrant directing a search for and seizure of the property in question.

The applicant may also submit depositions or affidavits of other persons containing allegations of fact supporting or tending to support those contained in the application.

(c) The application may also contain a request that the search warrant be made executable at any hour of the day or night upon the ground that there is probable cause to believe that (1) it cannot be executed during the hours of daylight, (2) the property sought is likely to be removed or destroyed if not seized forthwith, or (3) the property sought is not likely to be found except at certain times or in certain circumstances. Any request made pursuant to this subsection must be accompanied and supported by allegations of fact supporting such request. (July 29, 1970, 84 Stat. 615, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-522; Oct. 26, 1974, 88 Stat. 1455, Pub. L. 93-481, § 4(c).)

Cross references. — As to authorization of searches in gaming houses or bawdy houses, see § 4-145.

As to examination of books and search of premises of certain businesses, see § 4-148.

As to examination of pawned or pledged property, see § 4-149.

As to warrantless searches by Director of Weights, Measures, and Markets, see § 10-128.

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As to prohibition of advance information of raids to attorneys or bondsmen, see § 23-1109.

As to search warrants under Alcoholic Beverage Control Act, see § 25-129.

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As to search warrants to discover illegal use of milk containers, see §§ 48-205 and 48-305.

Section references. — This section is referred to in § 23-521.

Search warrant provision counterpart to federal rules. — The general provision relating to search warrants found in the District of Columbia Code and incorporated in similar form into the Superior Court Rules of Criminal Procedure was intended to be a counterpart to the comparable Federal Rules of Criminal Procedure. *Gooding v. United States*, 416 U.S. 430, 94 S. Ct. 1780, 40 L. Ed. 2d 250 (1974).

This section is applicable to search warrants issued in connection with federal offenses. *United States v. Gooding*, 328 F. Supp. 1005 (D.D.C. 1971), rev'd on other grounds, 477 F.2d 428 (D.C. Cir. 1973), aff'd, 416 U.S. 430, 94 S. Ct. 1780, 40 L. Ed. 2d 250 (1974).

In determining whether probable cause exists for issuance of a search warrant, so long as magistrate is sufficiently informed of underlying circumstances which justify belief in informer's reliability and underlying circumstances upon which informer concluded that contraband was where he claimed it was, informer's allegations require no independent corroboration. *Jones v. United States*, App. D.C., 336 A.2d 535, cert. denied, 423 U.S. 997, 96 S. Ct. 427, 46 L. Ed. 2d 372 (1975).

Restrictions upon issuance of nighttime search warrant. — In the absence of a showing that a search warrant cannot be executed during the day or that evidence which was allegedly in a vehicle to be searched is likely to be removed unless seized forthwith or would be in the vehicle only at certain times of day, allegations do not support issuance of nighttime search warrant. *Spence v. United States*, App. D.C., 370 A.2d 1351 (1977).

Laws dealing with narcotics and drugs control over general search warrant provisions of the United States and District of Columbia Codes. *United States v. Thomas*, App.

D.C., 294 A.2d 164, cert. denied, 409 U.S. 992, 93 S. Ct. 341, 34 L. Ed. 2d 258 (1972).

And qualify restrictions on nighttime searches. — The District of Columbia narcotics statute providing that "the judge or commissioner shall insert a direction in the warrant that it may be served at any time in the day or night," qualifies §§ 23-521 to 23-523 permitting a nighttime execution of the search warrant, if and only if, there is an express authorization therefore pursuant to statute; the latter sections are applicable to nonnarcotic cases only. *United States v. Green*, 331 F. Supp. 44 (D.D.C. 1971).

Affidavit reflected probable cause. — There was no need to demonstrate, in an affidavit in support of a search warrant, the reliability of an informant who merely aided in the initial contact with a person from whom an agent purchased heroin, where thereafter investigation proceeded independently, and, since the affidavit contained observations of the agent regarding the presence of heroin in the premises, the affidavit reflected sufficient probable cause to issue search warrant. *Tyler v. United States*, App. D.C., 298 A.2d 224 (1972).

There was sufficient evidence to support search warrant for defendant's residence where, although an undercover agent did not search the person from whom he purchased heroin before that person entered the residence, the affidavit in support of the search warrant demonstrated that the agent's covert status was unknown to the heroin seller, so the agent could not search such a person without compromising his status, and there was no reason to assume false dealings. *Tyler v. United States*, App. D.C., 298 A.2d 224 (1972).

Affidavit stating that attesting officer watched the front door of apartment building, a multistoried structure with many units, after giving informant money to purchase narcotics from defendant, rather than watching defendant's door does not, on theory that officer could not attest to informant's entry into defendant's apartment, thereby render search warrant based on such affidavit invalid. *Jones v. United States*, App. D.C., 336 A.2d 535, cert. denied, 423 U.S. 997, 96 S. Ct. 427, 46 L. Ed. 2d 372 (1975).

Warrant not defective for failure to contain grounds justifying nighttime search. — Where the judge issuing the warrant for a nighttime search of a juvenile's home must have known that the search was to be executed at night, the warrant authorized a nighttime search on its face, and the judge was orally informed that the property sought was likely to be removed or destroyed if not seized forthwith, the warrant was not defective because the application for it did not contain, in writing, any of grounds for authorizing nighttime

search. In re L.J.W., App. D.C., 370 A.2d 1333 (1977).

Cited in United States v. Edelen, App. D.C., 529 A.2d 774 (1987).

§ 23-523. Time of execution of search warrants.

(a) A search warrant shall not be executed more than ten days after the date of issuance and shall be returned to the court after its execution or expiration in accordance with section 23-521(f)(6).

(b) A search warrant may be executed on any day of the week and, in the absence of express authorization in the warrant pursuant to section 23-521 (f) (5), shall be executed only during the hours of daylight. (July 29, 1970, 84 Stat. 615, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-523.)

Search warrant provision counterpart to federal rules. — The general provision relating to search warrants found in the District of Columbia Code and incorporated in similar form into the Superior Court Rules of Criminal Procedure was intended to be a counterpart to the comparable Federal Rules of Criminal Procedure. *Gooding v. United States*, 416 U.S. 430, 94 S. Ct. 1780, 40 L. Ed. 2d 250 (1974).

This section is applicable to search warrants issued in connection with federal offenses. *United States v. Gooding*, 328 F. Supp. 1005 (D.D.C. 1971), rev'd on other grounds, 477 F.2d 428 (D.C. Cir. 1973), aff'd, 416 U.S. 430, 94 S. Ct. 1780, 40 L. Ed. 2d 250 (1974).

Laws dealing with narcotics and drugs control over general search warrant provisions of the United States and District of Columbia Codes. *United States v. Thomas*, App. D.C., 294 A.2d 164, cert. denied, 409 U.S. 992, 93 S. Ct. 341, 34 L. Ed. 2d 258 (1972).

And qualify the restrictions on nighttime searches. — The District of Columbia narcotics statute providing that "the judge or commissioner shall insert a direction in the warrant that it may be served at any time in

the day or night," qualifies §§ 23-521 to 23-523 permitting a nighttime execution of the search warrant, if and only if, there is an express authorization therefore pursuant to statute; the latter sections are applicable to nonnarcotic cases only. *United States v. Green*, 331 F. Supp. 44 (D.D.C. 1971).

A search warrant and its execution during the nighttime hours is proper in a narcotics case where there is a showing of probable cause both as to its existence and for its service at such time, and where it is accompanied by a supporting affidavit as well as by an insertion within the warrant as to when it could be served. *United States v. Green*, 331 F. Supp. 44 (D.D.C. 1971).

Delay in execution did not render search invalid. — Where warrant authorized a search of a delicatessen within 10 days of date of issuance of warrant for gambling paraphernalia, the fact that police permitted 8 days to elapse before executing the warrant did not render search unlawful. *United States v. Graves*, App. D.C., 315 A.2d 559 (1974).

Cited in *United States v. Edelen*, App. D.C., 529 A.2d 774 (1987); *United States v. Allen*, 960 F.2d 1055 (D.C. Cir.), cert. denied, 506 U.S. 881, 113 S. Ct. 231, 121 L. Ed. 2d 167 (1992).

§ 23-524. Execution of search warrants.

(a) An officer executing a warrant directing a search of a dwelling house or other building or a vehicle shall execute such warrant in accordance with section 3109 of Title 18, United States Code.

(b) An officer executing a warrant directing a search of a person shall give, or make reasonable effort to give, notice of his identity and purpose to the person, and, if such person thereafter resists or refuses to permit the search, such person shall be subject to arrest by such officer pursuant to section 23-581 (a) for violation of section 432 of the Revised Statutes of the United States relating to the District of Columbia (D.C. Code, sec. 22-505) (resisting a police officer) or other applicable provision of law.

(c)(1) An officer or agent executing a search warrant shall write and subscribe an inventory setting forth the time of the execution of the search warrant and the property seized under it.

(2) If the search is of a person, a copy of the warrant and of the return shall be given to that person.

(3) If the search is of a place, vehicle, or object, a copy of the warrant and of the return shall be given to the owner thereof if he is present, or if he is not, to an occupant, custodian, or other person present; or if no person is present, the officer shall post a copy of the warrant and of the return upon the premises, vehicle, or object searched.

(d) A copy of the warrant shall be filed with the court whose judge or magistrate authorized its issuance on the next court day after its execution, together with a copy of the return.

(e) An officer or agent executing a search warrant may seize any property discovered in the course of the lawful execution of such warrant if he has probable cause to believe that such property is subject to seizure under section 23-521 (d), even if the property is not enumerated in the warrant or the application therefor, and no additional warrant shall be required to authorize such seizure, if the property is fully set forth in the return. Such seizure may include taking physical or other impressions or performing chemical, scientific, or other tests or experiments.

(f) An officer or agent executing a search warrant may take photographs and measurements during the execution.

(g) An officer executing a warrant directing a search of premises or a vehicle may search any person therein (1) to the extent reasonably necessary to protect himself or others from the use of any weapon which may be concealed upon the person, or (2) to the extent reasonably necessary to find property enumerated in the warrant which may be concealed upon the person. (July 29, 1970, 84 Stat. 615, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-524; Oct. 26, 1974, 88 Stat. 1456, Pub. L. 93-481, § 4(d).)

Cross references. — As to execution of warrants by police force, see § 4-138.

As to search warrants in narcotic drug cases, see § 33-514.

Federal search subject to federal rule. — A search under a state warrant but conducted by the District of Columbia police, producing evidence examined by federal experts who later testified at a federal trial, was a "federal search" subject to federal rule. *United States v. Haywood*, 464 F.2d 756 (D.C. Cir. 1972).

Objection to federal search. — A claim that a federal search under a state warrant did not comply with the federal rule was not cognizable, separate from any constitutional objection, where no objection was raised at trial or until a motion under 28 U.S.C. § 2255 was filed. *United States v. Haywood*, 464 F.2d 756 (D.C. Cir. 1972).

Search of persons on premises when warrant executed. — Officers executing a

warrant for the search of a delicatessen for gambling paraphernalia, having received a tip from an informant that people inside had numbers slips on them, had sufficient grounds to search the 5 or 6 persons on the premises when the warrant was executed. *United States v. Graves*, App. D.C., 315 A.2d 559 (1974).

Upon executing a warrant authorizing the search of an after-hours club or bar for a "gaming table and other related gambling paraphernalia," the police had sufficient grounds to search the individuals present, and the tinfoil packet found up on the in-depth search of an occupant was properly seized and would be admissible in a prosecution for possession of heroin. *United States v. Miller*, App. D.C., 298 A.2d 34 (1972).

Knock and announce requirement. — The knock and announce requirement is inherent, at least to some degree, in the Fourth Amendment prohibition against unreasonable

searches and seizures. *Poole v. United States*, App. D.C., 630 A.2d 1109 (1993), cert. denied, — U.S. —, 115 S. Ct. 160, 130 L. Ed. 2d 98 (1994).

The underlying purpose of the knock and announce requirement is threefold: it reduces the potential for violence to both police officers and the occupants of the house into which entry is sought; it guards against the needless destruction of private property; and it symbolizes the respect for individual privacy summarized in the adage that a man's or woman's house is his or her castle. *Poole v. United States*, App. D.C., 630 A.2d 1109 (1993), cert. denied, — U.S. —, 115 S. Ct. 160, 130 L. Ed. 2d 98 (1994).

One of the primary purposes of the knock and announce requirement, in addition to the protection of individual privacy, is to prevent possible violent responses that might be aroused in a startled and fearful householder suddenly confronted with unknown persons breaking into his or her home for unannounced reasons. *Poole v. United States*, App. D.C., 630 A.2d 1109 (1993), cert. denied, — U.S. —, 115 S. Ct. 160, 130 L. Ed. 2d 98 (1994).

The appellate court, in reviewing compliance with the knock and announce requirement, must defer to the trial court's findings of fact unless they are clearly erroneous, and must accept all inferences drawn by the trial court as long as they are supportable under any reasonable view of the evidence; however, the appellate court reviews *de novo* the ultimate legal determination as to whether these facts and inferences support a conclusion that the police did not violate the statute. *Poole v. United States*, App. D.C., 630 A.2d 1109 (1993), cert. denied, — U.S. —, 115 S. Ct. 160, 130 L. Ed. 2d 98 (1994).

Where the police are attempting to execute a warrant related to a violent crime, a lesser degree of exigency is required if the police have at least knocked and announced themselves before making a forced entry, rather than entirely disregarding the knock and announce requirement. *Poole v. United States*, App. D.C., 630 A.2d 1109 (1993), cert. denied, — U.S. —, 115 S. Ct. 160, 130 L. Ed. 2d 98 (1994).

Failure to announce. — Police knowledge of the existence of a firearm excuses compliance with announcement requirements only where the officers reasonably believe the weapon will be used against them if they proceed with the ordinary announcements. *Poole v. United States*, App. D.C., 630 A.2d 1109 (1993), cert. denied, — U.S. —, 115 S. Ct. 160, 130 L. Ed. 2d 98 (1994).

Legality of forced entry. — Judicial determinations of the lawfulness of a forced entry are highly contextual and must be based upon a consideration of the totality of the circumstances; consequently, it is difficult to establish an absolute and unvarying test for reviewing alleged violations of the knock and announce

statutes. *Poole v. United States*, App. D.C., 630 A.2d 1109 (1993), cert. denied, — U.S. —, 115 S. Ct. 160, 130 L. Ed. 2d 98 (1994).

There are two situations in which the police need not wait for an actual reply before attempting a forced entry: where the police may reasonably infer from the actions or inactions of the occupants that they have been constructively refused admittance; and where the police are confronted with exigent circumstances, such as the imminent destruction of evidence or some danger to the entering officers. *Poole v. United States*, App. D.C., 630 A.2d 1109 (1993), cert. denied, — U.S. —, 115 S. Ct. 160, 130 L. Ed. 2d 98 (1994).

Exigent circumstances. — Where the government contends that exigent circumstances justify a forced entry because the police have reason to fear for their safety, the belief that a weapon is on the premises and may well be used must be based upon particularized information or specific prior incidents. An unjustified but sincere fear by an officer cannot excuse noncompliance, or the protection of the occupants' privacy interest would depend on no more than an officer's anxiety. *Poole v. United States*, App. D.C., 630 A.2d 1109 (1993), cert. denied, — U.S. —, 115 S. Ct. 160, 130 L. Ed. 2d 98 (1994).

Exigent circumstances are not limited to last minute surprises that are discovered by the police only after they have arrived on the scene. *Poole v. United States*, App. D.C., 630 A.2d 1109 (1993), cert. denied, — U.S. —, 115 S. Ct. 160, 130 L. Ed. 2d 98 (1994).

Exigent circumstances sufficient to excuse a forced entry do not exist anytime that the search is related to a violent crime; to adopt such a generalized exception to the knock and announce requirement would amount to virtually rewriting this section. *Poole v. United States*, App. D.C., 630 A.2d 1109 (1993), cert. denied, — U.S. —, 115 S. Ct. 160, 130 L. Ed. 2d 98 (1994).

A concern for police safety must be based upon prior knowledge or direct observation that the subject of the search keeps weapons and that such person has a known propensity to use them. *Poole v. United States*, App. D.C., 630 A.2d 1109 (1993), cert. denied, — U.S. —, 115 S. Ct. 160, 130 L. Ed. 2d 98 (1994).

Constructive refusal not shown. — Where a forced entry took place at 8:15 a.m. on a Saturday morning, and where there was no evidence that the police heard or saw anything that would have led them to believe that the occupants were awake, the police could not have reasonably believed that they had been constructively refused admittance. *Poole v. United States*, App. D.C., 630 A.2d 1109 (1993), cert. denied, — U.S. —, 115 S. Ct. 160, 130 L. Ed. 2d 98 (1994).

Warrantless search of defendant found on premises named in search warrant was

proper in view of this section which allows the officer executing a search warrant to search any person on the premises to an extent reasonably necessary to find the property enumerated in the warrant which may be concealed upon the person, and in view of the officer's knowledge of information from informant that a person fitting the defendant's general description had been seen selling narcotics on the named premises. *Thomas v. United States*, App. D.C., 352 A.2d 390 (1976).

Court's failure to determine all of suppression motion. — The court's grant of a suppression motion insofar as it related to

property not covered by warrant, while deferring the decision on the question of validity of the warrant on the ground that criminal prosecution had not yet been instituted, was improper. *United States v. Farmer*, App. D.C., 297 A.2d 783 (1972).

Cited in *White v. United States*, App. D.C., 512 A.2d 283 (1986); *United States v. Edelen*, App. D.C., 529 A.2d 774 (1987); *Washington v. District of Columbia*, 685 F. Supp. 264 (D.D.C. 1988); *Culp v. United States*, App. D.C., 624 A.2d 460 (1993); *Belton v. United States*, App. D.C., 647 A.2d 66 (1994), cert. denied, — U.S. —, 115 S. Ct. 1383, 131 L. Ed. 2d 236 (1995).

§ 23-525. Disposition of property.

An officer or agent who seizes property in the execution of a search warrant shall cause it to be safely kept for use as evidence. No property seized shall be released or destroyed except in accordance with law and upon order of a court or of the United States attorney or Corporation Counsel for the District of Columbia or one of their assistants. (July 29, 1970, 84 Stat. 616, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-525.)

Cross references. — As to powers and duties of Property Clerk of Metropolitan Police Department, see §§ 4-152 to 4-158.

As to disposition of drugs seized under Uniform Narcotic Drug Act, see § 33-518.

As to property subject to forfeiture under Drug Paraphernalia Act of 1982, see § 33-604.

District Court has jurisdiction and duty to return to defendant property seized from him in the criminal investigation but which was not alleged to be stolen or contraband and which was not needed or is no longer needed as evidence, and return of which had been sought before sentencing. *United States v. Wilson*, 540 F.2d 1100 (D.C. Cir. 1976).

Return of property cannot be resisted by assertion of forfeiture. — A claim by the owner for return of property cannot be successfully resisted by the government by asserting that the property is subject to forfeiture. If the Government seeks to forfeit the property, a proper proceeding should be instituted to accomplish that purpose. *United States v. Wilson*, 540 F.2d 1100 (D.C. Cir. 1976).

Cited in *United States v. Edelen*, App. D.C., 529 A.2d 774 (1987); *Johnson v. Gibson*, 14 F.3d 61 (D.C. Cir.), cert. denied, — U.S. —, 115 S. Ct. 70, 130 L. Ed. 2d 26 (1994).

Subchapter III. Wire Interception and Interception of Oral Communications.

§ 23-541. Definitions.

As used in this subchapter —

(1) the term "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities;

(2) the term "oral communication" means any oral communication uttered by a person exhibiting an expectation that the communication is not subject to interception under circumstances justifying the expectation;

(3) the term “intercept” means the aural acquisition of the contents of any wire or oral communication through the use of any intercepting device;

(4) the term “intercepting device” means any electronic, mechanical, or other device or apparatus which can be used to intercept a wire or oral communication other than —

(A) any telephone or telegraph instrument, equipment, or facility, or any component thereof, (i) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business; or (ii) being used by a communications common carrier in the ordinary course of its business, or by an investigative or law enforcement officer in the ordinary course of his duties; or

(B) a hearing aid or similar device being used to correct subnormal hearing to not better than normal;

(5) the term “investigative or law enforcement officer” means any officer of the United States or of the District of Columbia who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this subchapter, and any attorney authorized by law to prosecute or participate in the prosecution of such offenses;

(6) the term “contents”, when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to the communication or the existence, substance, purport, or meaning of that communication;

(7) the term “judge” means a judge of the Superior Court of the District of Columbia, a judge of the District of Columbia Court of Appeals, a judge of the United States District Court for the District of Columbia, or a judge of the United States Court of Appeals for the District of Columbia circuit;

(8) the term “judge of competent jurisdiction” means, in addition to the judges included in paragraph (7) —

(A) a judge of a United States district court or a United States court of appeals not in the District of Columbia; or

(B) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders authorizing interceptions of wire or oral communications;

(9) the term “aggrieved person” means a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed;

(10) the term “communication common carrier” has the same meaning which is given the term “common carrier” by section 3(h) of the Communications Act of 1934 (47 U.S.C. 153(h)); and

(11) the term “United States attorney” means the United States attorney for the District of Columbia or any of his assistants designated by him or otherwise designated by law to act in his place for the particular purpose in question. (July 29, 1970, 84 Stat. 616, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-541.)

Judge of United States District Court authorized to issue wiretap orders. — Section 23-547, read together with paragraph (7) of this section, explicitly authorizes the issuance of wiretap orders by “a judge of the United States District Court for the District of Columbia.” *United States v. Johnson*, 696 F.2d 115 (D.C. Cir. 1982).

Pen registers not within scope of wiretapping law. — Pen registers, which record outgoing numbers called on a particular telephone line, are not prohibited or regulated by the wiretap provisions of the District of Columbia Code. *Davis v. United States*, App. D.C., 390 A.2d 976 (1978).

§ 23-542. **Interception, disclosure, and use of wire or oral communications prohibited.**

(a) Except as otherwise specifically provided in this subchapter, any person who in the District of Columbia —

(1) willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire or oral communication;

(2) willfully discloses or endeavors to disclose to any other person the contents of any wire or oral communication, or evidence derived therefrom, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication; or

(3) willfully uses or endeavors to use the contents of any wire or oral communication, or evidence derived therefrom, knowing or having reason to know, that the information was obtained through the interception of a wire or oral communication;

shall be fined not more than \$10,000 or imprisoned not more than five years, or both; except that paragraphs (2) and (3) of this subsection shall not apply to the contents of any wire or oral communication, or evidence derived therefrom, that has become common knowledge or public information.

(b) It shall not be unlawful under this section for —

(1) an operator of a switchboard, or an officer, agent, or employee of a communication common carrier, whose facilities are used in the transmission of a wire communication, to intercept, disclose, or use that communication, in the normal course of his employment while engaged in any activity which is a necessary incident to the rendering of his service or to the protection of the rights or property of the carrier of such communication, or to provide information, facilities, or technical assistance to an investigative or law enforcement officer who, under this subchapter, is authorized to intercept a wire or oral communication, but no communication common carrier shall utilize service observing or random monitoring except for mechanical or service quality control checks;

(2) a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication, or where one of the parties to the communication has given prior consent to such interception; or

(3) a person not acting under color of law to intercept a wire or oral communication, where such person is a party to the communication, or where one of the parties to the communication has given prior consent to such interception, unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws

of the United States, any State, or the District of Columbia, or for the purpose of committing any other injurious act. (July 29, 1970, 84 Stat. 617, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-542.)

Section references. — This section is referred to in §§ 23-544 and 23-556.

One-party consent must have been given voluntarily in order for interception of wire or oral communication to be admissible as evidence against nonconsenting party. *United States v. Sell*, App. D.C., 487 A.2d 225 (1985).

Defendant must show improper inducement or coercive threats in order to suppress evidence of wiretap conducted pursuant

to one-party consent under subsection (b)(2). *United States v. Sell*, App. D.C., 487 A.2d 225 (1985).

Burden of showing voluntary consent under subsection (b)(2) may be met by the government's showing that consenting party engaged in communication knowing that it was being monitored by law enforcement officers. *United States v. Sell*, App. D.C., 487 A.2d 225 (1985).

§ 23-543. Possession, sale, distribution, manufacture, assembly, and advertising of wire or oral communication intercepting devices prohibited.

(a) Except as otherwise specifically provided in subsection (b) of this section, any person who in the District of Columbia —

(1) willfully possesses, sells, distributes, manufactures, or assembles an intercepting device, the design of which renders it primarily useful for the purpose of the surreptitious interception of a wire or oral communication; or

(2) willfully places in any newspaper, magazine, handbill, or other publication any advertisement of —

(A) any intercepting device, the design of which renders it primarily useful for the purpose of the surreptitious interception of a wire or oral communication; or

(B) any intercepting device where such advertisement promotes the use of such device for the purpose of the surreptitious interception of a wire or oral communication;

shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(b) It shall not be unlawful under this section for —

(1) a communication common carrier or an officer, agent, or employee of, or a person under contract with a communication common carrier, in the usual course of the communication common carrier's business; or

(2) a person under contract with the Government of the United States, a State or a political subdivision thereof, or the District of Columbia, or an officer, agent, or employee of the Government of the United States, a State or a political subdivision thereof, or the District of Columbia;

to possess, sell, distribute, manufacture or assemble, or advertise any intercepting device, while acting in furtherance of the appropriate activities of the United States, a State or political subdivision thereof, the District of Columbia, or a communication common carrier. (July 29, 1970, 84 Stat. 618, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-543.)

Section references. — This section is referred to in §§ 23-544 and 23-556.

Withdrawal of guilty plea based on misunderstanding of national security con-

siderations. — Where prosecution in its opening statement had outlined overwhelming case against the defendants, charged with burglary of political party headquarters and illegal electronic surveillance, pleas were accepted only after extraordinarily elaborate 4-day procedure, and neither counsel, prosecutor, nor judge exerted the slightest pressure on the defendants to induce them to plead guilty, with-

drawal of pleas would substantially prejudice legitimate prosecution interests, and the defendants would not be entitled, 8 months after pleading guilty, to withdraw their pleas because they honestly, though mistakenly, believed that "national security" considerations required their silence. *United States v. Barker*, 514 F.2d 208 (D.C. Cir.), cert. denied, 421 U.S. 1013, 95 S. Ct. 2420, 44 L. Ed. 2d 682 (1975).

§ 23-544. Confiscation of wire or oral communication intercepting devices.

Any intercepting device in the District of Columbia —

- (1) possessed;
- (2) used;
- (3) sold;
- (4) distributed; or
- (5) manufactured or assembled;

in violation of section 23-542 or 23-543 may be seized and forfeited to the District of Columbia. Insofar as applicable and not inconsistent with the provisions of this chapter, all provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property; the remission or mitigation of such forfeitures; the compromise of claims; and the award of compensation to informers in respect of such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this title; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this section by such officers, agents or other persons as may be authorized or designated for that purpose by the Mayor, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer. The proceeds from the sale of any property forfeited under this section shall be deposited in the Treasury to the credit of the general fund of the District of Columbia. (July 29, 1970, 84 Stat. 619, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-544; Apr. 30, 1988, D.C. Law 7-104, § 7(b), 35 DCR 147.)

Legislative history of Law 7-104. — Law 7-104, the "Technical Amendments Act of 1987," was introduced in Council and assigned Bill No. 7-346, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 24, 1987 and December 8, 1987, respectively. Signed by the Mayor on December 22, 1987, it was assigned Act No. 7-124 and transmitted to both Houses of Congress for its review.

Change in government. — This section originated at a time when local government powers were delegated to the District of Colum-

bia Council and to a Commissioner of the District of Columbia. The District of Columbia Self-Government and Governmental Reorganization Act, 87 Stat. 818, § 711 (D.C. Code, § 1-211), abolished the District of Columbia Council and the Office of Commissioner of the District of Columbia. These branches of government were replaced by the Council of the District of Columbia and the Office of Mayor of the District of Columbia, respectively. Accordingly, and also pursuant to § 714(a) of such Act (D.C. Code, § 1-213(a)), appropriate changes in terminology were made in this section.

§ 23-545. Immunity of witnesses.

Repealed. Oct. 15, 1970, 84 Stat. 931, Pub. L. 91-452, title II, § 252.

§ 23-546. Applications for authorization or approval of interception of wire or oral communications.

(a) The United States attorney may authorize, in writing, any investigative or law enforcement officer to make application to a court for an order authorizing the interception of wire or oral communications.

(b) The United States attorney may authorize, in writing, any investigative or law enforcement officer to make application to a court for an order of approval of the previous interception of any wire or oral communication, when the contents of such communication —

(1) relate to an offense other than that specified in an order of authorization;

(2) were intercepted in an emergency situation; or

(3) were intercepted in an emergency situation and relate to an offense other than that contemplated at the time the interception was made.

(c) An application for an order of authorization (as provided in subsection (a) of this section) or of approval (as provided in paragraph (2) of subsection (b) of this section) may be authorized only when the interception of wire or oral communications may provide or has provided evidence of the commission of or a conspiracy to commit any of the following offenses:

(1) Any of the offenses specified in the Act entitled “An Act to establish a code of law for the District of Columbia”, approved March 3, 1901, and listed in the following table:

Offense:	Specified in —
Arson	sections 820, 821 (D.C. Code, secs. 22-401, 22-402).
Burglary	section 823 (D.C. Code, sec. 22-1801).
Destruction of property of value in excess of \$200	section 848 (D.C. Code, sec. 22-403).
Gambling	sections 863, 866, 869e (D.C. Code, secs. 22-1501, 22-1505, 22-1513).
Kidnapping	section 812 (D.C. Code, sec. 22-2101).
Murder	sections 798, 800 (D.C. Code, secs. 22-2401, 22-2403).
Robbery	section 810 (D.C. Code, sec. 22-2901).

(2) Bribery as specified in the Act of February 26, 1936 (D.C. Code, sec. 22-704).

(3) Threats as specified in section 1501 of the Omnibus Crime Control and Safe Streets Act of 1968 (D.C. Code, secs. 22-2306, 22-2307).

(4) Offenses involving the manufacture, distribution, or possession with intent to manufacture or distribute controlled substances as specified in sections 401 through 403 of the District of Columbia Uniform Controlled Substances Act of 1981, effective August 5, 1981 (D.C. Code, secs. 33-441 [33-541] through -443 [-543]).

(5) Any of the offenses specified in the District of Columbia Theft and White Collar Crimes Act of 1982, and listed in the following table:

Offense:

Extortion	
Blackmail	
Bribery	
Obstruction of justice	
Receiving stolen property of value in excess of \$250	
Theft of property of value in excess of \$250 .	
Trafficking in stolen property	

Specified in —

section 151 [D.C. Code, § 22-3851].
section 152 [D.C. Code, § 22-3852].
section 302 [D.C. Code, § 22-712].
section 502 [D.C. Code, § 22-722].
section 132 [D.C. Code, § 22-3832].
section 111 [D.C. Code, § 22-3811].
section 131 [D.C. Code, § 22-3831].

(July 29, 1970, 84 Stat. 620, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-546; Dec. 1, 1982, D.C. Law 4-164, § 601(f), 29 DCR 3976; Apr. 30, 1988, D.C. Law 7-104, § 7(c), 35 DCR 147.)

Cross references. — As to bribery, see § 22-712.

As to obstruction of justice, see § 22-722.

As to theft, see § 22-3811.

As to trafficking in stolen property, see § 22-3831.

As to receiving stolen property, see § 22-3832.

As to extortion, see § 22-3851.

As to blackmail, see § 22-3852.

Section references. — This section is referred to in §§ 23-547 and 23-556.

Legislative history of Law 4-164. — See note to § 22-3801.

Legislative history of Law 7-104. — See note to § 23-544.

References in text. — “Section 1501 of the Omnibus Crime Control and Safe Streets Act of 1968,” referred to in paragraph (3) of subsection (c) of this section, was codified as § 22-2306. Section 22-2306 was repealed by § 602(mm) of D.C. Law 4-164.

“D.C. Code, ... [§] 22-2307,” referred to at the end of paragraph (3) of subsection (c) of this section, derived from § 1502 of the Omnibus Crime Control and Safe Streets Act of 1968.

In paragraph (4) of subsection (c) of this section, “33-541” and “-543” were inserted in brackets to reflect the codification of §§ 401 through 403 of the District of Columbia Uniform Controlled Substances Act of 1981.

The “District of Columbia Theft and White Collar Crimes Act of 1982,” referred to in paragraph (5) of subsection (c) of this section, is D.C. Law 4-164.

Bracketed translations of the references to the District of Columbia Theft and White Collar Crimes Act of 1982 have been inserted in paragraph (5) of subsection (c) of this section for the convenience of the user.

Editor’s notes. — Section 7(c) of D.C. Law 7-104 purported to substitute “33-502” for “33-402,” “33-516” for “33-416,” and “33-602” for “33-702” in subsection (c)(4), apparently without regard to the amendment of this section by D.C. Law 4-164.

Power to authorize application restricted to United States Attorney. — The United States attorney for the District of Columbia is the only person who may authorize an application for electronic surveillance, consistent with the intent of Congress to centralize policy control in the chief prosecuting officer. *United States v. Johnson*, 696 F.2d 115 (D.C. Cir. 1982).

Additional authorization required when communication relates to offense outside subsection (c). — This section requires additional authorization when the contents of a communication relate to an offense other than those listed in subsection (c). *Davis v. United States*, App. D.C., 390 A.2d 976 (1978).

But evidence not necessarily suppressed for failure to seek additional authorization. — Where the initial authorization of a wiretap was proper and the court was informed from the beginning of the range of offenses under investigation, the government’s failure to seek additional authorization to intercept communications relating to an offense not enumerated in subsection (c) did not prevent use of that wiretap evidence at trial. *Davis v. United States*, App. D.C., 390 A.2d 976 (1978).

Violation of writing requirement may not automatically require suppression. — Although Congress chose to impose a writing requirement in this section, the mere difference in language between this section and Title 3 of the Omnibus Crime Control and Safe Streets Act of 1968, does not indicate that a violation of the writing requirement of subsection (a) of this section automatically demands suppression. *United States v. Johnson*, 696 F.2d 115 (D.C. Cir. 1982).

Conduct satisfying purposes of section and evidentiary function of writing requirement. — Where the United States attorney not only actually authorized the applications for electronic surveillance, but also, pursuant to established Justice Department policy, sought and received the authorization of 2 assistant attorneys general who had been

specifically designated to approve federal wire-tap applications, both the overarching purposes of this section — ensuring uniformity and political accountability — and the more limited evidentiary function of the writing requirement

were clearly satisfied. *United States v. Johnson*, 696 F.2d 115 (D.C. Cir. 1982).

Cited in *United States v. Robinson*, 698 F.2d 448 (D.C. Cir. 1983).

§ 23-547. Procedure for authorization or approval of interception of wire or oral communications.

(a) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge and shall state the applicant's authority to make the application. Each application shall include —

(1) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(2) a full and complete statement of the facts and circumstances relied upon by the applicant to justify his belief that an order should be issued, including (A) details as to the particular offense that has been, is being, or is about to be committed, (B) a particular description of the nature and location of the facilities from which or the place where the communication is to be or was intercepted, (C) a particular description of the type of communications sought to be or which were intercepted, and (D) the identity of the person, if known, who committed, is committing, or is about to commit the offense and whose communications are to be or were intercepted;

(3) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear or appeared to be unlikely to succeed if tried or to be too dangerous;

(4) a statement of the period of time for which the interception is or was required to be maintained, and if the nature of the investigation is or was such that the authorization for interception should not automatically terminate or should not have automatically terminated when the described type of communication has been or was first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will or would occur thereafter;

(5) a full and complete statement of the facts concerning all previous applications, known to the individual authorizing or making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities, or places specified in the application, and the action taken by the judge on each such application; and

(6) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain results.

(b) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(c) Upon application the judge may enter an *ex parte* order, as requested or as modified, authorizing or approving interception of wire or oral communications within the District of Columbia, if the judge determines on the basis of the facts submitted by the applicant that —

(1) there is or was probable cause for belief that the person whose communication is to be or was interpreted is or was committing, has committed, or is about to commit a particular offense enumerated in section 23-546;

(2) there is or was probable cause for belief that particular communications concerning that offense will or would be obtained through the interception;

(3) normal investigative procedures have or would have been tried and have or had failed or reasonably appear or appeared to be unlikely to succeed if tried or to be too dangerous; and

(4) there is or was probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be or were intercepted were used, are being used, or are about to be used, in connection with the commission of the offense, or are or were leased to, listed in the name of, or commonly used by the person referred to in paragraph (1).

(d) If the facilities from which a wire communication is to be or was intercepted are or were being used by, are or were about to be used by, or are or were leased to, listed in the name of, or commonly used by, a licensed physician, a licensed attorney, or practicing clergyman, or if the place where an oral communication is to be or was intercepted is or was a place used primarily for habitation by a husband and wife or primarily by a licensed physician, licensed attorney, or practicing clergyman for his own professional purposes, no order authorizing or approving such interception may be issued unless the court, in addition to the matters provided in subsection (c) of this section, determines that —

(1) such facilities or place are or were being used or are or were about to be used in connection with conspiratorial activities characteristic of organized crime; and

(2) such interceptions will be so conducted as to minimize or eliminate the number of interceptions of privileged wire or oral communications between licensed physicians and patients, licensed attorneys and clients, practicing clergymen and confidants, and husbands and wives.

No otherwise privileged wire or oral communication intercepted in accordance with, or in violation of, the provisions of this subchapter shall lose its privileged character.

(e) Each order authorizing or approving the interception of any wire or oral communication shall specify —

(1) the identity of the person, if known, or otherwise a particular description of the person, if known, whose communications are to be or were intercepted;

(2) the nature and location of the communication facilities as to which, or the place where, authority to intercept or any approval of interception is or was granted;

(3) a particular description of the type of communication sought to be or which was intercepted, and a statement of the particular offense to which it relates;

(4) the identity of the agency authorized to intercept or whose interception is approved, and of the person authorizing the application; and

(5) the period of time during or for which the interception is authorized or approved, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

(f) An order authorizing the interception of a wire or oral communication shall, upon request of the applicant, direct that a communication common carrier, landlord, custodian, or other person shall furnish the applicant forthwith all information, facilities, or technical assistance necessary to accomplish the interception unobtrusively and with a minimum of interference with the services that such carrier, landlord, custodian, or person is according the person whose communications are to be intercepted. Any communication common carrier, landlord, custodian, or other person furnishing such facilities or technical assistance shall be compensated therefore by the applicant at the prevailing rates.

(g) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (a) of this section and the court making the findings required by subsection (c) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept shall be executed as soon as practicable, shall be conducted in such a way as to minimize or eliminate the interception of communications not otherwise subject to interception under this subchapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days.

(h) Whenever an order authorizing interception is entered pursuant to this subchapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Reports shall be made at such intervals as the judge may require. (July 29, 1970, 84 Stat. 621, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-547.)

Section references. — This section is referred to in §§ 23-551, 23-555 and 23-556.

Judge of United States District Court authorized to issue wiretap orders. — This section, read together with § 23-541(7), explicitly authorizes the issuance of wiretap orders by “a judge of the United States District Court for the District of Columbia.” *United States v. Johnson*, 696 F.2d 115 (D.C. Cir. 1982).

General recognition that wiretaps neither initial step nor last resort. — In construing 18 U.S.C. § 2518 (1) (c) and (3) (c), courts have interpreted the requirement also appearing in subsections (a) (3) and (c) (3) of this section flexibly, recognizing that wiretaps are neither a routine initial step nor an absolute last resort. *United States v. Williams*, 580

F.2d 578 (D.C. Cir.), cert. denied, 439 U.S. 832, 99 S. Ct. 112, 58 L. Ed. 2d 127 (1978).

Warrant for wire interception of oral communications must be specific and, if more than 1 entry is involved, each intrusion must be treated formally and approved in advance so that a judge or magistrate can supervise when and how entry is to be accomplished and a separate determination of probable cause and reasonableness is required as to each intrusion upon private premises. *United States v. Ford*, 414 F. Supp. 879 (D.D.C. 1976), aff’d, 553 F.2d 146 (D.C. Cir. 1977).

Mere fact of association with a person engaged in illegal activities is insufficient to support a finding of probable cause for purpose of including a name as target of a wiretap

in an application and court order approving wiretap. *United States v. Johnson*, 539 F.2d 181 (D.C. Cir. 1976), cert. denied, 429 U.S. 1061, 97 S. Ct. 784, 50 L. Ed. 2d 776 (1977).

Authorization defective where conventional investigation might obviate wiretap. — Wiretapping authorization would be defective for failure to make further conventional investigations only where such investigations might obviate wiretap itself. *United States v. Johnson*, 539 F.2d 181 (D.C. Cir. 1976), cert. denied, 429 U.S. 1061, 97 S. Ct. 784, 50 L. Ed. 2d 776 (1977).

“Bugging” private premises limited. — Although it may be necessary to place “bugging” devices on private premises, such “bugging” is to be accomplished with the court’s authorization limited to narrowest precise point necessary to accomplish the law enforcement purpose and the reasons for the intrusion must be included in the public record ultimately available for further court review whenever prosecution results. *United States v. Ford*, 414 F. Supp. 879 (D.D.C. 1976), aff’d, 553 F.2d 146 (D.C. Cir. 1977).

Obligation to minimize interception of unrelated conversation. — There is an obligation on the part of judges and investigators to make reasonable efforts to minimize interception of conversation unrelated to original purpose of wiretap; however, this obligation does not extend to shutting off the tape recorder in the midst of properly authorized and conducted interception when unexpected evidence of an-

other crime presents itself. *United States v. Johnson*, 539 F.2d 181 (D.C. Cir. 1976), cert. denied, 429 U.S. 1061, 97 S. Ct. 784, 50 L. Ed. 2d 776 (1977).

Disclosure of prior wiretap authorizations required. — Government attorneys who sought authorization for wiretaps of certain individuals in connection with an investigation of gambling activities were required to disclose to the court the fact that a prior authorization for interception of communications of one of the persons under investigation had been granted, even though the prior authorization had been in connection with an unrelated narcotics investigation. *United States v. Bellosi*, 501 F.2d 833 (D.C. Cir. 1974).

Judge’s approval of investigation did not avoid consequences of overbroad warrant. — That judge in fact approved each entry of private premises for electronic surveillance in advance and knew that, contrary to broad terms of warrant, police were planning to enter at a reasonable time, does not avoid consequences of overbreadth of the warrant itself, where the discussions that led to the judicial approval of each entry were not transcribed or presented by affidavits so that there is no supporting record to review. *United States v. Ford*, 414 F. Supp. 879 (D.D.C. 1976), aff’d, 553 F.2d 146 (D.C. Cir. 1977).

Cited in *In re Grand Jury Proceedings*, 613 F.2d 1171 (D.C. Cir. 1979); *United States v. Robinson*, 698 F.2d 448 (D.C. Cir. 1983).

§ 23-548. Additional procedure for approval of interception of wire or oral communications.

(a) Notwithstanding any other provision of this subchapter, any investigative or law enforcement officer, specially designated by the United States attorney for the District of Columbia, who reasonably determines that —

(1) an emergency situation exists with respect to conspiratorial activities characteristic of organized crime that requires a wire or oral communication to be intercepted before an order authorizing the interception can with due diligence be obtained, and

(2) there are grounds upon which an order could be entered under this subchapter to authorize interception, may intercept the wire or oral communication if an application for an order approving the interception is initiated in accordance with this section within twelve hours and is completed within seventy-two hours after the interception has occurred, or begins to occur. In the absence of an order, the interception shall immediately terminate when the communication sought is obtained or when the application for the order is denied, whichever is earlier. In the event the application for approval is denied, or in any other case where the interception is terminated without an order having been issued, the contents of any wire or oral communication intercepted shall be treated as having been

obtained in violation of this subchapter, and an inventory shall be served as provided for in section 23-550 on the person named in the application.

(b) When an investigative or law enforcement officer, while engaged in intercepting wire or oral communications in the manner authorized by this subchapter, intercepts wire or oral communications relating either to offenses other than those specified in the order of authorization or to offenses other than those offenses for which interception was made pursuant to subsection (a) of this section, he shall make an application to a judge as soon as practicable for approval for disclosure and use, in accordance with section 23-553, of the information intercepted. (July 29, 1970, 84 Stat. 623, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-548.)

Section references. — This section is referred to in §§ 23-550, 23-555 and 23-556.

Legislative intent. — Congress did not intend to confer a greater right to suppress evidence derived from wiretapping or electronic surveillance than the Constitution guarantees. *Khaalis v. United States*, App. D.C., 408 A.2d 313 (1979), cert. denied, 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781 (1980).

Obligation to minimize interception of unrelated conversation. — There is an obligation on the part of judges and investigators to make reasonable efforts to minimize interception of conversation unrelated to original purpose of wiretap; however, this obligation does not extend to shutting off the tape recorder in the midst of properly authorized and conducted interception when unexpected evidence of another crime presents itself. *United States v. Johnson*, 539 F.2d 181 (D.C. Cir. 1976), cert. denied, 429 U.S. 1061, 97 S. Ct. 784, 50 L. Ed. 2d 776 (1977).

Exception for wiretap authorized by federal law. — The provisions of subsection (b) concerning prior approval for use of other crimes evidence resulting from wiretap do not apply where prior wiretap was authorized under federal law. *United States v. Johnson*, 539 F.2d 181 (D.C. Cir. 1976), cert. denied, 429 U.S. 1061, 97 S. Ct. 784, 50 L. Ed. 2d 776 (1977).

No expectation of privacy in building take-over. — Where defendants forcibly took over buildings and held hostages for several days, defendants did not have a legitimate expectation of privacy, protected by the Fourth Amendment, against seizure of their telephone conversations by electronic surveillance on the premises. *Khaalis v. United States*, App. D.C., 408 A.2d 313 (1979), cert. denied, 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781 (1980).

Affidavit deemed to satisfy subsection (b) under implicit authorization rule. — Where the affidavit accompanying an application for extension of electronic surveillance clearly informed the judge of the interception of evidence relating to the offenses for which the appellants were prosecuted, combined with the government's clear statement of its intention to seek federal indictments and the fact that the crimes under consideration are very similar, the affidavit satisfied subsection (b) of this section under the implicit authorization rule adopted by a number of courts interpreting 18 U.S.C. § 2517(5) (1976), "other offense" provision of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. *United States v. Johnson*, 696 F.2d 115 (D.C. Cir. 1982).

§ 23-549. Maintenance and custody of records.

(a) The contents of any wire or oral communication intercepted by any means authorized by this subchapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subchapter shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, the recordings shall be made available to the judge issuing the order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for

use or disclosure pursuant to the provisions of subsection (a) of section 23-553, for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (b) of section 23-553.

(b) Applications made and orders granted under this subchapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. The applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years.

(c) Any violation of the provisions of this subsection may be punished as contempt of court. (July 29, 1970, 84 Stat. 624, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-549.)

Section references. — This section is referred to in §§ 23-551 and 23-556.

Evidence indicating custody precluding tampering important to government's "satisfactory explanation." — In most cases, evidence from which the court can infer that the tapes were held in such a condition as to

ensure that they could not be tampered with will be an important component of the government's "satisfactory explanation." *United States v. Johnson*, 696 F.2d 115 (D.C. Cir. 1982); *United States v. Robinson*, 698 F.2d 448 (D.C. Cir. 1983).

§ 23-550. Inventory.

Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 23-548 which is denied, or the termination of the period of any order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine, in his discretion, are necessary in the interest of justice, an inventory which shall include notice of —

(1) the fact of the entry of the order or the application for an order of approval which was denied;

(2) the date of the entry of the order or the denial of the application for an order of approval;

(3) the period of authorized, approved, or disapproved interception; and

(4) whether during the period wire or oral communications were intercepted.

The judge, upon the filing of a motion, may in his discretion make available to the person or his counsel for inspection such portions of the intercepted communications, applications, and orders as the judge determines to be in the interests of justice. On an ex parte showing of good cause to a judge, the serving of the inventory required by this subsection may be postponed. (July 29, 1970, 84 Stat. 624, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-550.)

Section references. — This section is referred to in §§ 23-548, 23-551 and 23-556.

Defendants' receipt of actual notice of wiretap is bar to any suppression argu-

ment based on noncompliance with the inventory requirement of this section, at least where the failure to give formal notice was not a deliberate act of either court or government.

United States v. Johnson, 539 F.2d 181 (D.C. Cir. 1976), cert. denied, 429 U.S. 1061, 97 S. Ct. 784, 50 L. Ed. 2d 776 (1977).

§ 23-551. Procedure for disclosure and suppression of intercepted wire or oral communications.

(a) The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States or the District of Columbia unless not less than ten days before the trial, hearing, or proceeding —

(1) the inventory as provided in section 23-550 has been served; and

(2) the parties to the action have been served with a copy of the order and accompanying application under which the interception was authorized or approved.

This ten-day period may be waived by court order where a court finds that it was not possible to furnish the party with the above information ten days before the trial hearing, or proceeding and that the party will not be prejudiced by the delay in receiving the information.

(b) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States or the District of Columbia, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that —

(1) the communication was unlawfully intercepted;

(2) the order of authorization or approval under which it was intercepted is insufficient on its face;

(3) the interception was not made in conformity with the order of authorization or approval;

(4) service was not made as provided in section 23-547; or

(5) the seal prescribed by section 23-549 (a) is not present and there is no satisfactory explanation for its absence.

The motion shall be made before the trial, hearing or proceeding unless there was no opportunity to make the motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this subchapter and shall not be received in evidence in the trial, hearing, or proceeding. The judge, upon the filing of the motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice. (July 29, 1970, 84 Stat. 624, Pub. L. 91-358, title II, § 210(a); Dec. 7, 1970, 84 Stat. 1390, Pub. L. 91-530, § 2(c); 1973 Ed., § 23-551.)

Section references. — This section is referred to in §§ 23-552 and 23-556.

“Unlawfully intercepted” has same meaning in both federal and local statutory schemes. *United States v. Robinson*, 698 F.2d 448 (D.C. Cir. 1983).

Evidence indicating custody precluding tampering central to government’s “satisfactory explanation.” — In most cases, evidence from which the court can infer that the tapes were held in such a condition as to ensure that they could not be tampered with will be an important component of the government’s “satisfactory explanation.” If the government cannot present such evidence, its explanation will be highly suspect. *United States v. Johnson*, 696 F.2d 115 (D.C. Cir. 1982); *United States v. Robinson*, 698 F.2d 448 (D.C. Cir. 1983).

Suppression warranted only where requirement central to underlying purpose unsatisfied. — The suppression remedy would be warranted only when the government fails to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device. *United States v. Robinson*, 698 F.2d 448 (D.C. Cir. 1983).

Failure to object to wiretap evidence before trial waives objection. — Under District of Columbia wiretapping statutes, failure to raise an objection before trial to admission of wiretap communications waives the right to object to the admission of such evidence, in the absence of evidence that defendants had no opportunity to make a suppression motion or that they were not aware of the grounds of such a motion. *United States v. Johnson*, 539 F.2d 181 (D.C. Cir. 1976), cert. denied, 429 U.S. 1061, 97 S. Ct. 784, 50 L. Ed. 2d 776 (1977).

Movant to suppress must have standing. — Before an accused may complain that pros-

ecution evidence obtained by electronic eavesdropping should be suppressed because it was come by illegitimately, he must first establish his standing; that is, he must show that the eavesdropping was directed at him, that the government intercepted his conversations or that the wiretapped communications occurred at least partly on his premises. *United States v. Williams*, 580 F.2d 578 (D.C. Cir.), cert. denied, 439 U.S. 832, 99 S. Ct. 112, 58 L. Ed. 2d 127 (1978).

Persons who are not parties to an intercepted conversation lack standing to make a statutory challenge under subsection (a) of this section. *Khaalis v. United States*, App. D.C., 408 A.2d 313 (1979), cert. denied, 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781 (1980).

Unlawful interception where application failed to disclose earlier wiretap. — Communications which were intercepted pursuant to wiretap which was authorized on basis of application which failed to disclose previous wiretap authorization directed against 1 of the individuals under investigation were “unlawfully intercepted” within meaning subsection (b)(1). *United States v. Bellosi*, 501 F.2d 833 (D.C. Cir. 1974).

And persons overheard through such wiretap could seek suppression. — All persons whose telephone conversations were intercepted pursuant to wiretap which was authorized on basis of application which failed to disclose that one of the persons under investigation had previously been the subject of a wiretap had standing to seek suppression of the intercepted communication. *United States v. Bellosi*, 501 F.2d 833 (D.C. Cir. 1974).

Persons who are trespassers when their conversations are taped are not “aggrieved persons” under subsection (b) of this section. *Khaalis v. United States*, App. D.C., 408 A.2d 313 (1979), cert. denied, 444 U.S. 1092, 100 S. Ct. 1059, 62 L. Ed. 2d 781 (1980).

§ 23-552. Government appeals.

In addition to any other right to appeal, the United States or the District of Columbia, as the case may be, shall have the right to appeal from an order granting a motion to suppress made under section 23-551 or from the denial of an application for an order of approval, if the United States or the District of Columbia, as the case may be, shall certify to the judge or other official granting such motion or denying the application that the appeal is not taken for purposes of delay. Appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted. (July 29, 1970, 84 Stat. 625, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-552.)

Section references. — This section is referred to in § 23-556.

§ 23-553. Authorization for disclosure and use of intercepted wire or oral communications.

(a) Any investigative or law enforcement officer who, by any authorized means and in conformity with this subchapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose or use such contents or evidence to the extent that such disclosure or use is appropriate to the proper performance of his official duties.

(b) Any person who, by any authorized means and in conformity with this subchapter, has obtained knowledge of the contents of any wire or oral communication intercepted in accordance with this subchapter, or other lawful authority, or evidence derived therefrom, may disclose the contents of such communication or evidence while giving testimony under oath or affirmation in any criminal trial, hearing, or proceeding before any grand jury or court.

(c) The contents of any wire or oral communication intercepted in conformity with this subchapter, or evidence derived therefrom, may otherwise be disclosed or used only by court order upon a showing of good cause. (July 29, 1970, 84 Stat. 625, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-553.)

Section references. — This section is referred to in §§ 23-548, 23-549 and 23-556.

§ 23-554. Authorization for recovery of civil damages.

(a) Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this subchapter shall —

(1) have a civil cause of action against any person who intercepts, discloses, or uses, or procures any other person to intercept, disclose, or use, such communications; and

(2) be entitled to recover from any such person —

(A) actual damages, but not less than liquidated damages computed at the rate of \$100 a day for each day of violation, or \$1,000 whichever is higher;

(B) punitive damages; and

(C) a reasonable attorney's fee and other litigation costs reasonably incurred.

(b) Good faith reliance on a court order or legislative authorization shall constitute a complete defense to an action brought under this section or any other law.

(c) As used in this section, the term "person" includes the District of Columbia. The District of Columbia shall not assert any governmental immunity to avoid liability under this section. Judgment against the District of Columbia shall not constitute a bar to action against any other person. (July 29, 1970, 84 Stat. 626, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-554.)

Cross references. — As to return of property by Property Clerk, see § 4-157.

Section references. — This section is referred to in § 23-556.

§ 23-555. Reports concerning intercepted wire or oral communications.

(a) Within thirty days after the expiration of an order or an extension entered under section 23-547 or 23-548 or the denial of an order of approval, the issuing or denying court shall report to the chief judge of the District of Columbia Court of Appeals —

- (1) that an order or extension was applied for;
- (2) the kind of order or extension applied for;
- (3) if the order or extension was granted as applied for, was modified, or was denied;
- (4) the period of the interceptions authorized by the order, and the number and duration of any extensions of the order;
- (5) the offense specified in the order or application, or extension of an order;
- (6) the identity of the applying investigative or law enforcement officer, the agency making the application, and the person authorizing the application; and
- (7) the character and location of the facilities from which and the place where communications were (and were to be) intercepted.

(b) In January of each year the United States Attorney for the District of Columbia shall report to the Congress of the United States and the chief judge of the District of Columbia Court of Appeals —

(1) the information required by paragraphs (1) through (7) of subsection (a) of this section with respect to each application for an order or extension made during the immediately preceding calendar year;

(2) a general description of the interceptions made under such order or extension, including —

(A) the approximate character and frequency of incriminating communications intercepted;

(B) the approximate character and frequency of other communications intercepted;

(C) the approximate number of persons whose communications were intercepted; and

(D) the approximate character, amount, and cost of the manpower and other resources used in the interceptions;

(3) the number of arrests resulting from interceptions made under such order or extension;

(4) the offenses for which the arrests were made;

(5) the number of trials resulting from such interceptions;

(6) the number of motions to suppress made with respect to such interceptions;

(7) the number of motions to suppress granted or denied;

(8) the number of convictions resulting from such interceptions;

(9) the offenses for which the convictions were obtained;

(10) a general assessment of the importance of the interceptions; and

(11) for purposes of comparison, the information required by paragraphs (2) through (10) of this subsection with respect to orders and extensions obtained in other preceding calendar years.

(c) Reports made pursuant to the section shall be made in accordance with regulations prescribed by the Director of the Administration Office of the United States Courts under section 2519 (3) of Title 18, United States Code. (July 29, 1970, 84 Stat. 626, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-555.)

Section references. — This section is referred to in § 23-556.

Suppression inappropriate remedy for violation of section. — Suppression of the

fruits of electronic surveillance would be an inappropriate remedy for a violation of this noncentral provision. *United States v. Johnson*, 696 F.2d 115 (D.C. Cir. 1982).

§ 23-556. Relation to Federal law on wire interception and interception of oral communications.

(a) Sections 23-542, 23-543, 23-545, 23-553, 23-554, and 23-555 of this subchapter shall be construed to supplement, and not to supersede or otherwise limit, the provisions of chapter 119 of Title 18, United States Code (relating to wire interception and interception of oral communications).

(b) Sections 23-546, 23-547, 23-548, 23-549, 23-550, 23-551, and 23-552 of this subchapter shall be construed not to supersede or otherwise limit the provisions of chapter 119 of Title 18, United States Code, except in cases of irreconcilable conflict. (July 29, 1970, 84 Stat. 627, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-556.)

References in text. — Section 23-545, referred to in subsection (a) of this section, was repealed by the Act of October 15, 1970, 84 Stat. 931, Pub. L. 91-452, § 252.

Cited in *United States v. Johnson*, 696 F.2d 115 (D.C. Cir. 1982).

Subchapter IV. Arrest Warrant and Summons.

§ 23-561. Issuance, form, and contents.

(a)(1) A judicial officer may issue a warrant for the arrest of any person upon a sworn complaint which states facts constituting an offense over which the judicial officer has jurisdiction for trial or preliminary examination, and establishing probable cause to believe that the person committed the offense. More than one warrant may issue on the same complaint.

(2) Upon request of the prosecutor, a summons shall issue instead of an arrest warrant. More than one summons may issue on the same complaint. If a person fails to appear in response to a summons, a warrant shall issue for his arrest.

(b)(1) An arrest warrant shall be signed by the judicial officer and shall state or contain the name of the issuing court, the date of issuance of the warrant, a description of the offense charged, and the name of the person to be arrested or, if his name is unknown, any name or description by which he can be

identified with reasonable certainty. It shall command that the person be arrested and brought before the issuing court or officer.

(2) A summons shall be in the same form as an arrest warrant except that it shall summon the person named to appear before the issuing court or officer at a stated time and place.

(c) An arrest warrant may be directed to a specific law enforcement officer or to any classifications of officers of the Metropolitan Police of the District of Columbia or other agency authorized to make arrests or execute process.

(d) Each complaint shall be made in writing upon oath or affirmation. Except for good cause shown, no warrant shall be issued unless the complaint has been approved by an appropriate prosecutor. (July 29, 1970, 84 Stat. 627, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-561; Oct. 26, 1974, 88 Stat. 1456, Pub. L. 93-481, § 4(e).)

Warrant held issued under law of United States. — Felony arrest warrant issued under this section and directed to any United States Marshal for service within the United States was issued under a "law of the United States" within the meaning of 18 U.S.C. § 1071 (pro-

scribing the harboring of persons in order to prevent their arrest). *United States v. Boettcher*, 588 F.2d 89 (4th Cir. 1978).

Cited in *District of Columbia v. Hobo*, 117 WLR 1133 (Super. Ct. 1989); *Tucker v. United States*, App. D.C., 569 A.2d 162 (1990).

§ 23-562. Execution and return.

(a)(1) A warrant issued pursuant to this subchapter shall be executed by the arrest of the person named. The officer need not have the warrant in his possession at the time of the arrest, but upon request he shall show the warrant to the person as soon as possible. If the officer does not have the warrant in his possession at the time of the arrest, he shall inform the person of the offense charged and of the fact that a warrant has been issued.

(2) A summons shall be served upon a person by delivering a copy to him personally, by leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by mailing it to the person's last known address.

(b)(1) The officer executing a warrant shall make return thereof to the judicial officer before whom the person is brought for preliminary examination. At the request of the appropriate prosecutor, any unexecuted and unexpired warrant shall be returned to the issuing court or judicial officer and shall be canceled.

(2) On or before the return day the person to whom a summons was delivered for service shall make return thereof to the court or officer before whom the summons is returnable.

(3) At the request of the appropriate prosecutor made at any time while the complaint is pending, a warrant returned unexecuted and not canceled or expired or a summons returned unserved or a duplicate thereof may be delivered by the judicial officer to the marshal or other authorized person for execution or service.

(c)(1) A law enforcement officer within the District of Columbia making an arrest under a warrant issued pursuant to this subchapter, making an arrest without a warrant, or receiving a person arrested by a special policeman or

other person pursuant to section 23-582, shall take the arrested person without unnecessary delay before the court or other judicial officer empowered to commit persons charged with the offense for which the arrest was made. This subsection, however, shall not be construed to conflict with or otherwise supersede section 3501 of Title 18, United States Code. When a person arrested without a warrant is brought before a judicial officer, a complaint or information shall be filed forthwith.

(2) Before taking an arrested person to a judicial officer, a law enforcement officer may perform any recording, fingerprinting, photographing, or other preliminary police duties required in the particular case, and if such duties are performed with reasonable promptness, the period of time required therefor shall not constitute a delay within the meaning of this section. (July 29, 1970, 84 Stat. 628, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-562.)

Cross references. — As to execution of warrants by police force, see § 4-138.

Arrest warrant provides authority to enter any premises for purpose of enforcing warrant, if police officer has probable cause to believe that subject is located therein. *United States v. Brown*, 467 F.2d 419 (D.C. Cir. 1972).

Standards for execution of arrest warrant at a residence of third party not named in the warrant is reasonable belief of police officer that person named in the warrant is present in the third party's residence. *United States v. Brown*, 467 F.2d 419 (D.C. Cir. 1972).

Right to prompt presentment is fundamental constitutional right. *Lively v. Cullinane*, 451 F. Supp. 1000 (D.D.C. 1978).

Standard for evaluating pre-presentment procedures. — Police processing procedures before presentment to a magistrate violate the Fourth Amendment unless they detain the arrestee only so long as needed to complete the administrative steps incident to arrest. *Lively v. Cullinane*, 451 F. Supp. 1000 (D.D.C. 1978).

The police can justify each delay before presentment only by a strong showing that it is necessitated by a substantial administrative need. *Lively v. Cullinane*, 451 F. Supp. 1000 (D.D.C. 1978).

Police procedures which unconstitutionally delayed presentment before a magistrate included lineups, interviews and the completion of forms which could have been accomplished after presentment or from other sources, fingerprinting and photographing which could easily have followed presentment, and failure to consider processing and presentment times when training and scheduling personnel. *Lively v. Cullinane*, 451 F. Supp. 1000 (D.D.C. 1978).

Mass arrests of demonstrators by police were not invalid for failure to contemporaneously complete field arrest forms or other procedures for recording information necessary to

establish probable cause. *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107 (D.C. Cir. 1977).

It was error to order police officials to formulate a comprehensive manual of policies to be followed in dealing with mass demonstrations absent showing that police officials directed, authorized or approved use of excessive force, any showing that it was department policy to detain prisoners an unreasonable time or deny them adequate medical treatment or that delay in booking was due to anything other than a great number of arrests in prior demonstrations, notwithstanding that in individual cases mistakes may have been made. *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107 (D.C. Cir. 1977).

Disorderly conduct. — Where persons taken into custody during Vietnam war demonstrations were told by police that they were under arrest and, if they asked, were informed that they were charged with disorderly conduct, there was no violation of due process, on ground that statement of the charges was not sufficiently specific. *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107 (D.C. Cir. 1977).

Miranda warnings not required at time of arrest. — Miranda warnings are required at the commencement of questioning initiated by law enforcement officers after a person has been taken into custody and such warnings are not required at the time of arrest, absent a showing of any improper question of prisoner at scene of the arrest. *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107 (D.C. Cir. 1977).

Probable cause to search premises. — Where police officers, in attempting to execute a warrant for the arrest of a usually armed suspect who was involved in narcotics and wanted for murder, saw 2 men enter apartment building of suspect's girl friend with a private key about 11:30 p.m., saw lights in the area of

the girl friend's apartment light up, and waited from 11:00 p.m. to 5:00 a.m. before announcing their presence, such officers had probable cause to enter the apartment and search for the

suspect. *United States v. Brown*, 467 F.2d 419 (D.C. Cir. 1972).

Cited in *Speed v. United States*, App. D.C., 562 A.2d 124 (1989).

§ 23-563. Territorial and other limits.

(a) A warrant or summons for an offense punishable by imprisonment for more than one year issued by the Superior Court of the District of Columbia may be served at any place within the jurisdiction of the United States.

(b) A warrant or summons issued by the Superior Court of the District of Columbia for an offense punishable by imprisonment for not more than one year, or by a fine only, or by such imprisonment and a fine, may be served in any place in the District of Columbia but may not be executed more than one year after the date of issuance.

(c) A person arrested outside the District of Columbia on a warrant issued by the Superior Court of the District of Columbia shall be taken before a judge, commissioner, or magistrate, and held to answer in the Superior Court pursuant to the Federal Rules of Criminal Procedure as if the warrant had been issued by the United States District Court for the District of Columbia.

(d) When an application alleges that (1) an act which would constitute a felony if committed by an adult has been committed by a child, (2) the child may not with due diligence be found within the District of Columbia, and (3) if the District of Columbia is a party to article XVII of the Interstate Compact on Juveniles, the child is not known to be in a jurisdiction which is a party to such article, a juvenile officer may secure a warrant for the arrest of the child as if he were an adult. When the child is brought before the issuing court or officer pursuant to the warrant he shall be ordered transferred to the Family Division of the Superior Court pursuant to section 16-2302. If the child is found in a jurisdiction which is a party to such article and if the District of Columbia is a party to such article, he shall be returned as provided in that article and the warrant shall be null and void. (July 29, 1970, 84 Stat. 628, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-563.)

References in text. — The Interstate Compact on Juveniles, referred to in the first sentence of subsection (d) of this section, is codified in § 32-1102.

Nationwide reach exercise of national legislative power. — In giving warrants under subsection (a) nationwide reach, Congress was exercising its power as a national and not as a strictly local legislature. *United States v. Boettcher*, 588 F.2d 89 (4th Cir. 1978).

Any person arrested on a Superior Court warrant outside the District is treated, for purposes of removal to the District, as if the warrant had been issued by the United States District Court for the District of Columbia. *Hagans v. United States*, App. D.C., 408 A.2d 965 (1979).

In limited circumstance when misdemeanor probationer's supervision is transferred to receiving state under Inter-

state Parole and Probation Compact, the Superior Court's arguably geographically limited authority for issuance of a misdemeanor warrant under subsection (b) of this section is irrelevant; insofar as the warrant is signed without territorial limitation directed to the United States Marshal, it constitutes a direction to an officer of this court to "apprehend and retake" a probationer under § 24-251(3) and must accordingly be so honored. *United States v. Hanna*, 114 WLR 1153 (Super. Ct. 1986).

Warrant invalid as matter of law. — Where a computer printout which police officers examined prior to an arrest indicated that the arrest warrant for a misdemeanor had been issued approximately 18 months previously, the officers knew or reasonably should have known that that warrant was invalid as a matter of law, and the arrestee thus had an action for false arrest and imprisonment. *Woodward v.*

District of Columbia, App. D.C., 387 A.2d 726 (1978). D.C., 394 A.2d 1 (1978), cert. denied, 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315 (1979).

Cited in *Christian v. United States*, App.

Subchapter V. Arrest Without Warrant.

§ 23-581. Arrests without warrant by law enforcement officers.

(a)(1) A law enforcement officer may arrest, without a warrant having previously been issued therefor —

(A) a person who he has probable cause to believe has committed or is committing a felony;

(B) a person who he has probable cause to believe has committed or is committing an offense in his presence;

(C) a person who he has probable cause to believe has committed or is about to commit any offense listed in paragraph (2) and, unless immediately arrested, may not be apprehended, may cause injury to others, or may tamper with, dispose of, or destroy evidence; and

(D) a person whom he has probable cause to believe has committed any offense which is listed in paragraph (3) of this section, if the officer has reasonable grounds to believe that, unless the person is immediately arrested, reliable evidence of alcohol or drug use may become unavailable or the person may cause personal injury or property damage.

(2) The offenses referred to in subparagraph (C) of paragraph (1) are the following:

(A) The following offenses specified in the Act entitled “An Act to establish a code of law for the District of Columbia”, approved March 3, 1901, and listed in the following table:

Offense:	Specified in —
Assault	section 806 (D.C. Code, sec. 22-504).
Unlawful entry	section 824 (D.C. Code, sec. 22-3102).

(B) Attempts to commit burglary as specified in section 823 of An Act To establish a code of law for the District of Columbia, approved March 3, 1901 (D.C. Code, sec. 22-1801).

(C) The following offenses specified in the District of Columbia Theft and White Collar Crimes Act of 1982, and listed in the following table:

Offense:	Specified in —
Theft of property valued less than \$250 ...	section 111 [D.C. Code, § 22-3811]
Receiving stolen property	section 132 [D.C. Code, § 22-3832]
Shoplifting	section 113 [D.C. Code, § 22-3813]

(D) Attempts to commit the following offenses specified in the Act and listed in the following table:

Offense:	Specified in —
Theft of property valued in excess of \$250 .	section 111 [D.C. Code, § 22-3811]
Unauthorized use of vehicles	section 115 [D.C. Code, § 22-3815]

(E) The following offenses specified in the Illegal Dumping Enforcement Act of 1993 [§§ 6-2911 — 6-2913, and 6-2915], and listed in the following table:

Offense:	Specified in —
Unauthorized Disposal of Solid Waste	Section 3.

(3) The offenses which are referred to in paragraph (1)(D) of this section are the following offenses specified in the District of Columbia Traffic Act of 1925, approved March 3, 1925 (43 Stat. 1119; D.C. Code § 40-701 et seq.), and listed in the following table:

Offense:	Specified in —
Reckless driving	section 9(b) (D.C. Code § 40-712(b))
Fleeing from the scene of an accident	section 10(a) (D.C. Code § 40-716(a))
Operating or physically controlling a vehicle when under the influence of intoxicating liquor or drugs, when operating ability is impaired by intoxicating liquor, or when the operator's blood, breath, or urine contains the amount of alcohol which is prohibited by section 10(b)	section 10(b) (D.C. Code § 40-716(b))
Operating a motor vehicle when the operator's permit is revoked or suspended . . .	section 13(e) (D.C. Code § 40-302(e)).

(a-1) A law enforcement officer may arrest a person without an arrest warrant if the officer has probable cause to believe the person has committed an intrafamily offense as provided in section 16-1031(a).

(a-2) A law enforcement officer may arrest a person without an arrest warrant if the officer has probable cause to believe the person has committed an offense as provided in Chapter 33A of Title 22.

(b) A law enforcement officer may, even if his jurisdiction does not extend beyond the District of Columbia, continue beyond the District, if necessary, a pursuit commenced within the District of a person who has committed an offense or who he has probable cause to believe has committed or is committing a felony, and may arrest that person in any State the laws of which contain provisions equivalent to those of section 23-901. (July 29, 1970, 84 Stat. 629, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-581; Dec. 1, 1982, D.C. Law 4-164, § 601(g), 29 DCR 3976; Aug. 2, 1983, D.C. Law 5-24, § 4, 30 DCR 3341; Apr. 30, 1988, D.C. Law 7-104, § 7(d), 35 DCR 147; April 30, 1990, D.C. Law 8-261, § 3, 37 DCR 5001; May 5, 1992, D.C. Law 9-96, § 5, 38 DCR 7274; Nov. 17, 1993, D.C. Law 10-54, § 8, 40 DCR 5450; Nov. 20, 1993, D.C. Law 10-62, § 7(c), 40 DCR 7237; Feb. 5, 1994, D.C. Law 10-68, § 55(a), 40 DCR 6311; May 20, 1994, D.C. Law 10-117, § 8(c), 41 DCR 524.)

Cross references. — As to theft, see § 22-3811.

As to unauthorized use of motor vehicles, see § 22-3815.

As to receiving stolen property, see § 22-3832.

Section references. — This section is referred to in §§ 23-524 and 23-582.

Effect of amendments. — D.C. Law 10-68 substituted “whom” for “who” in (a)(1)(D), substituted “paragraph (1)(D) of this section” for

“subparagraph (D) of paragraph (1)” in (a)(3), and made internal reference and capitalization changes in the table.

D.C. Law 10-117 added (a)(2)(E).

Legislative history of Law 4-164. — Law 4-164, the “District of Columbia Theft and White Collar Crimes Act of 1982,” was introduced in Council and assigned Bill No. 4-133, which was referred to the Committee on the Judiciary. The Bill was adopted on first, amended first and second readings on June 22,

1982, July 6, 1982, and July 20, 1982, respectively. Signed by the Mayor on August 4, 1982, it was assigned Act No. 4-238 and transmitted to both Houses of Congress for its review.

Legislative history of Law 5-24. — Law 5-24, the “Technical and Clarifying Amendments Act of 1983,” was introduced in Council and assigned Bill No. 5-169; which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on May 10, 1983, and May 24, 1983, respectively. Signed by the Mayor on June 9, 1983, it was assigned Act No. 5-41 and transmitted to both Houses of Congress for its review.

Legislative history of Law 7-104. — Law 7-104, the “Technical Amendments Act of 1987,” was introduced in Council and assigned Bill No. 7-346, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 24, 1987 and December 8, 1987, respectively. Signed by the Mayor on December 22, 1987, it was assigned Act No. 7-124 and transmitted to both Houses of Congress for its review.

Legislative history of Law 8-261. — Law 8-261, the “District of Columbia Prevention of Domestic Violence Amendment Act of 1992,” was introduced in Council and assigned Bill No. 8-192, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on June 26, 1990, and July 10, 1990, respectively. Signed by the Mayor on July 18, 1990, it was assigned Act No. 8-239 and transmitted to both Houses of Congress for its review.

Legislative history of Law 9-96. — Law 9-96, the “Comprehensive Anti-Drunk Driving Amendment Act of 1991,” was introduced in Council and assigned Bill No. 9-34, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on October 1, 1991, and November 5, 1991, respectively. Signed by the Mayor on November 25, 1991, it was assigned Act No. 9-98 and transmitted to both Houses of Congress for its review.

Legislative history of Law 10-54. — Law 10-54, the “Panhandling Control Act of 1993,” was introduced in Council and assigned Bill No. 10-72, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on June 1, 1993, and June 29, 1993, respectively. Signed by the Mayor on July 16, 1993, it was assigned Act No. 10-48 and transmitted to both Houses of Congress for its review. D.C. Law 10-54 became effective on November 17, 1993.

Legislative history of Law 10-62. — Law 10-62, the “Illegal Dumping Enforcement Temporary Act of 1993,” was introduced in Council and assigned Bill No. 10-353. The Bill was adopted on first and second readings on July 13, 1993, and September 21, 1993, respectively.

Signed by the Mayor on October 4, 1993, it was assigned Act No. 10-115 and transmitted to both Houses of Congress for its review. D.C. Law 10-62 became effective on November 20, 1993.

Legislative history of Law 10-68. — Law 10-68, the “Technical Amendments Act of 1993,” was introduced in Council and assigned Bill No. 10-166, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on June 29, 1993, and July 13, 1993, respectively. Signed by the Mayor on August 23, 1993, it was assigned Act No. 10-107 and transmitted to both Houses of Congress for its review. D.C. Law 10-68 became effective on February 5, 1994.

Legislative history of Law 10-117. — Law 10-117, the “Illegal Dumping Enforcement Act of 1994,” was introduced in Council and assigned Bill No. 10-249, which was referred to the Committee on Public Works and the Environment. The Bill was adopted on first and second readings on December 7, 1993, and January 4, 1994, respectively. Signed by the Mayor on January 25, 1994, it was assigned Act No. 10-181 and transmitted to both Houses of Congress for its review. D.C. Law 10-117 became effective on May 20, 1994.

References in text. — The “District of Columbia Theft and White Collar Crimes Act of 1982,” referred to in subsection (a)(2)(C) of this section, and the “Act”, referred to in subsection (a)(2)(D) of this section, is D.C. Law 4-164.

Bracketed translations of the references to the District of Columbia Theft and White Collar Crimes Act of 1982 have been inserted in subsections (a)(2)(C) and (a)(2)(D) of this section for the convenience of the user.

The “Illegal Dumping Enforcement Act of 1993” referred to in (a)(2)(E) is D.C. Law 10-62, which is codified primarily as §§ 6-2911 to 6-2913 and 6-2915.

Fourth Amendment does not require police inaction. — The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. *Stephenson v. United States*, App. D.C., 296 A.2d 606 (1972), cert. denied, 411 U.S. 907, 93 S. Ct. 1535, 36 L. Ed. 2d 197 (1973).

Constitution does not permit arrest at the scene of a demonstration, without probable cause at the time of the arrest, in the hope that evidence uncovered during the process of detention may serve as a basis for prosecuting at least some of those arrested. *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir.), cert. denied, 414 U.S. 880, 94 S. Ct. 162, 38 L. Ed. 2d 125 (1973).

Section is for most part a codification of common law. *United States v. Hamilton*, App. D.C., 390 A.2d 449 (1978).

Standards which justify intrusion. — In justifying a particular intrusion, a police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. *Stephenson v. United States*, App. D.C., 296 A.2d 606 (1972), cert. denied, 411 U.S. 907, 93 S. Ct. 1535, 36 L. Ed. 2d 197 (1973).

Burden of establishing probable cause. — When the public authorities take action that must stand or fall on the basis of an underlying arrest, and when the validity of that arrest is questioned in an appropriate proceeding, the burden of establishing probable cause rests entirely upon the government. *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir.), cert. denied, 414 U.S. 880, 94 S. Ct. 162, 38 L. Ed. 2d 125 (1973).

Miranda warnings not required at time of arrest. — Miranda warnings are required at the commencement of questioning initiated by law enforcement officers after a person has been taken into custody and such warnings are not required at the time of arrest, absent a showing of any improper question of prisoner at scene of the arrest. *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107 (D.C. Cir. 1977).

Verbal characterization of crime at time of arrest immaterial. — Whether or not a police officer who made a warrantless arrest verbally characterized the particular crime for which he made his arrest at the time of making same was immaterial, since the description given by the officer did not go to the question of probable cause, and only question was whether officer had reasonable ground to believe a felony had been committed. *Bond v. United States*, App. D.C., 310 A.2d 221 (1973).

Disorderly conduct. — Where persons taken into custody during Vietnam war demonstrations were told by police that they were under arrest and, if they asked, were informed that they were charged with disorderly conduct, there was no violation of due process, on ground that statement of the charges was not sufficiently specific. *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107 (D.C. Cir. 1977).

Ultimate misdemeanor charge would not necessarily invalidate arrest under subsection (a)(1)(A). — The fact that a defendant was charged with a misdemeanor violation of former § 33-502(a) did not preclude finding his arrest valid under subdivision (a)(1)(A) of this section. *United States v. Hamilton*, App. D.C., 390 A.2d 449 (1978).

Lawful arrest under subdivision (a)(1)(A) of this section. — Police officer effected lawful arrest under subdivision (a)(1)(A) of this section where he acted in reliance on information provided by his partner, who had purchased a narcotic pill from the

defendant and her companion, and where he was aware that such a sale could have supported a federal felony charge. *United States v. Hamilton*, App. D.C., 390 A.2d 449 (1978).

Under subdivision (a)(1)(B). — Where a deputy U.S. Marshall legally detained party outside a courthouse for questioning regarding a possible breach of security at a courtroom and requested a driver's license for identification, whereupon the detainee forcibly grabbed the deputy, there was probable cause to arrest him under subdivision (a)(1)(B) of this section for assaulting and interfering with a federal officer in the performance of his official duties. *Lucas v. United States*, 443 F. Supp. 539 (D.D.C. 1977), aff'd, 590 F.2d 356 (D.C. Cir. 1979).

Circumstances constituted stop rather than arrest. — Where an officer detained a suspect for only a moment before suspect admitted possessing gun, and officer's frisk of suspect was only of his top coat, the circumstances constituted a stop, not an arrest. *Robinson v. United States*, App. D.C., 355 A.2d 567 (1976).

Stop and questioning of suspects justified. — Where 2 police officers observed defendant and companion running down street in downtown area at 4:30 a.m. and slow to a walk when they spotted the officers, and 1 officer had knowledge of prior recent crimes in that area, the officers were justified in stopping defendant and companion to question them as to their prior whereabouts. *Stephenson v. United States*, App. D.C., 296 A.2d 606 (1972), cert. denied, 411 U.S. 907, 93 S. Ct. 1535, 36 L. Ed. 2d 197 (1973).

Observation of concealed object. — The fact that only 1 of the 2 police officers who confronted the defendant on a public street saw the tape player that the defendant was concealing under his coat did not render the officers' testimony inadmissible. *Jenkins v. United States*, App. D.C., 284 A.2d 460 (1971).

Defendant in officer's presence. — Where the defendant, who had been questioned by an officer on another matter, was still in view when the officer, who had been told that the defendant had a syringe under her wig, stopped the defendant to ask if she was wearing a wig, the defendant had not left officer's presence within the meaning of subsection (a)(1)(B) of this section. *United States v. Oliver*, App. D.C., 297 A.2d 778 (1972).

Probable cause to effectuate an arrest is a defense available to a law enforcement officer sued for the torts of assault, battery and false arrest. *Lucas v. United States*, 443 F. Supp. 539 (D.D.C. 1977), aff'd, 590 F.2d 356 (D.C. Cir. 1979).

Probable cause as defense to false arrest claim. — If a police officer has so-called constitutional probable cause to arrest, determined by reference to the objective standard used to

determine probable cause in a criminal proceeding, the arrest will be lawful and the officer accordingly will have a complete defense to a false arrest claim. *District of Columbia v. Murphy*, App. D.C., 635 A.2d 929 (1993).

Meaning of probable cause in that context. — An officer defending a civil suit for assault, battery and false arrest need not prove probable cause in the constitutional sense but only his good faith and reasonable belief that probable cause existed for the arrest. *Lucas v. United States*, 443 F. Supp. 539 (D.D.C. 1977), *aff'd*, 590 F.2d 356 (D.C. Cir. 1979).

To prevail in a civil suit for assault, battery and false arrest, the arresting officer need not prove probable cause in the constitutional sense, but rather must prove that he had a reasonable good faith belief that the suspect committed the offense. *Safeway Stores, Inc. v. Kelly*, App. D.C., 448 A.2d 856 (1982).

Where probable cause was lacking to arrest a plaintiff on the announced charge, but where probable cause existed to believe that he committed a different offense proffered by the defense after the fact, the defense can avoid liability if the consequences for the plaintiff probably would have been substantially as unfavorable if he had been arrested on the charge on which the defense seeks to rely after the fact. *Etheredge v. District of Columbia*, App. D.C., 635 A.2d 908 (1993).

Appellate court must view evidence of probable cause from perspective of arresting officer, and not the plaintiff, for purposes of subsection (a)(1)(B) of this section. *Safeway Stores, Inc. v. Kelly*, App. D.C., 448 A.2d 856 (1982).

"In his presence" illustrated. — Offenses of driving while intoxicated and with no permit were committed in the presence of the arresting officer, making a warrantless arrest lawful within subsection (a)(1)(B) of this section, where the officer arrived on the scene shortly after the accident occurred, observed the vehicle responsible for the accident and the defendant standing a few feet away, was informed by eyewitnesses that the defendant was the driver, obtained a voluntary admission from the defendant that she was driving at the time of the accident, and observed that no one else could have been the driver of the vehicle causing the accident. *District of Columbia v. Schram*, 112 WLR 165 (Super. Ct. 1984).

Police may validly order violent or obstructive demonstrators to disperse or clear the streets and if any demonstrator or bystander refuses to obey such an order after fair notice and opportunity to comply, his arrest does not violate the Constitution even though he has not previously been violent or obstructive. *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107 (D.C. Cir. 1977).

Mass arrests of demonstrators by police were not invalid for failure to contemporaneously complete field arrest forms or other procedures for recording information necessary to establish probable cause. If all members of a group are arrested the prosecutor may be able to prove, by testimony of on-the-scene policemen, that there was probable cause to believe that the group as a whole was violating the law by violence or obstruction or by remaining on the scene after reasonable notice and opportunity to disperse. *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107 (D.C. Cir. 1977).

It was error to order police officials to formulate a comprehensive manual of policies in dealing with mass demonstrations absent showing that police officials directed, authorized, or approved use of excessive force, that it was policy to detain prisoners an unreasonable time or deny them adequate medical treatment, or that delay in booking was due to anything other than a great number of arrests in prior demonstrations, notwithstanding that in individual cases mistakes may have been made. *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107 (D.C. Cir. 1977).

District police inspector is individually liable for unlawful and unreasonable arrests of members of a religious group, who were conducting a peaceful prayer vigil near the White House, where there was no evidence to suggest possibility of violence or property damage at scene of the vigil other than simple fact that outsiders who joined the vigil had the same appearance as persons who were present at the monument grounds when unknown persons destroyed property. *Tatum v. Morton*, 402 F. Supp. 719 (D.D.C.), *supp. opinion*, 386 F. Supp. 1308 (D.D.C. 1974), *modified*, 562 F.2d 1279 (D.C. Cir. 1977).

And District, under common law theory of respondeat superior, is liable for the actions of its police inspector who was operating within scope of his duties as senior police officer at scene of unlawful arrests. *Tatum v. Morton*, 402 F. Supp. 719 (D.D.C.), *supp. opinion*, 386 F. Supp. 1308 (D.D.C. 1974), *modified*, 562 F.2d 1279 (D.C. Cir. 1977).

Expungement of records available. — Persons who were unlawfully arrested while participating in peaceful vigil of prayer on White House sidewalk in 1971 are entitled to full expungement of their arrest records, including entry of a court order declaring that the seizures should be deemed to have been "detentions" rather than "arrests." *Tatum v. Morton*, 562 F.2d 1279 (D.C. Cir. 1977).

But injunctive relief inappropriate. — Class-wide injunctive relief ordering police department to expunge records of persons who had been arrested during mass demonstrations without probable cause is inappropriate. Per-

sons arrested should present their requests for expungement of their records to the police department, which should not assert that it is barred by statute from expunging such arrest records. *Washington Mobilization Comm. v. Cullinane*, 400 F. Supp. 186 (D.D.C. 1975), rev'd on other grounds, 566 F.2d 107 (D.C. Cir. 1977).

Limitation on damages for unlawful arrest erroneous. — The court, in awarding damages to persons unlawfully arrested while participating in peaceful vigil of prayer on White House sidewalk in 1971, erred in limiting recoverable damages on the grounds that the plaintiffs had sought notoriety by participating in the demonstration and that some of the plaintiffs had chosen not to post \$10 collateral when they were given opportunity to do so in order to procure their release. *Tatum v. Morton*, 562 F.2d 1279 (D.C. Cir. 1977).

Punitive damages properly denied. — The court acted properly in denying punitive damages to persons who were unlawfully arrested while participating in peaceful vigil of prayer on White House sidewalk in 1971 as part of a protest against the government's war policies in Vietnam. *Tatum v. Morton*, 562 F.2d 1279 (D.C. Cir. 1977).

Warrantless arrest valid following victim's identification of defendant. — Where an officer had the victim point out suspects, but after taking the victim to the prosecutor's office for protection was unable to find defendant and the officer then went to the motel at which the defendant was reportedly staying and arrested him, arrest without a warrant was valid. *Bond v. United States*, App. D.C., 310 A.2d 221 (1973).

Probable cause sufficient. — Where police officers who had observed the defendant peering into automobiles later observed defendant holding some object under his coat and a search for weapons disclosed that the defendant was concealing a tape player with broken connecting wires, action of police in confronting defendant on street was reasonable and disclosure of the tape player gave officers probable cause for arrest. *Jenkins v. United States*, App. D.C., 284 A.2d 460 (1971).

Where a police officer was told by another that the defendant, whom the officer had questioned, had a syringe under her wig, the officer's momentary stopping of the defendant, inquiry about the wig, and request to the defendant to remove her hat were reasonable; the defendant's denial of wearing a wig and its obvious presence furnished independent observation and corroboration which gave rise to a reasonable basis to arrest defendant. *United States v. Oliver*, App. D.C., 297 A.2d 778 (1972).

Police officers who were admitted to the defendant's apartment with the defendant's consent during the course of an investigation of the death of a 5-year-old girl and who observed

scratches on the defendant's face, the presence of candy, the general disarray of the room, and indications of recent bathing by the defendant, had probable cause for arrest. *United States v. Sheard*, 473 F.2d 139 (D.C. Cir. 1972), cert. denied, 412 U.S. 943, 93 S. Ct. 2784, 37 L. Ed. 2d 404 (1973).

Where an officer observed the accused looking behind the desk in an office and observed him depart as soon as officer's presence became known, and the accused answered "nothing" when the officer asked him outside the building what he had been doing in the office, officer had probable cause to arrest accused. *Arrington v. United States*, App. D.C., 311 A.2d 838 (1973).

Where defendant, on officer's request, displayed an automobile radio he was carrying, and his companion denied knowing the defendant, officer was possessed of sufficient facts and circumstances warranting belief that offense had been committed and justifying arrest, even though officer had received no report of automobile radio theft. *Wray v. United States*, App. D.C., 315 A.2d 843 (1974).

A police officer who had interviewed an alleged assault victim and concluded that his complaint was genuine, had probable cause to believe that an armed assault had taken place and that accused had committed it, and in light of the exigent nature of the circumstances had probable cause to arrest accused without an arrest warrant. *United States v. Simpson*, App. D.C., 330 A.2d 756 (1975).

Where informant supplied police with detailed information about defendant's possession of marijuana and every aspect of such information, including place, time, and physical appearance, was checked and verified by police officer, police officer had probable cause for arrest. *United States v. Malcolm*, App. D.C., 331 A.2d 329 (1975).

Where police officer looked into a hotel room after the door was opened and saw people injecting some substance into themselves, the officer had probable cause to believe that the individuals inside were injecting narcotics and he had both the right and the duty to seize the contraband and place the individuals under arrest. *Matthews v. United States*, App. D.C., 335 A.2d 251 (1975).

Where an officer observes a person inside a vacant building, the officer has reason to believe that person does not belong there, and the property itself reveals indications of a continued claim of possession by the owner or manager, there is probable cause to arrest for unlawful entry. *Culp v. United States*, App. D.C., 486 A.2d 1174 (1985).

Officer's observation of defendant's possession of an open can of beer on the sidewalk, in violation of § 25-128(a), provided probable cause for arrest under this section. *Alvarez v. United States*, App. D.C., 576 A.2d 713, cert.

denied, 498 U.S. 875, 111 S. Ct. 203, 112 L. Ed. 2d 164 (1990).

The collective knowledge of the police can give rise to a valid arrest, only if the arresting officer acts in response to a broadcast or other directive which is based on the collective information. *Haywood v. United States*, App. D.C., 584 A.2d 552 (1990).

Where a defendant admitted committing several offenses, including driving without a license, a misdemeanor, at that point, probable cause existed to arrest him and to perform a search incident to arrest. *United States v. Cutchin*, 956 F.2d 1216 (D.C. Cir. 1992).

Probable cause insufficient. — Where the defendant, a high school student, was observed outside the school building trying to stuff money into an envelope similar to those used in other narcotics transactions at the school, was approached by a known narcotics addict, and started to run when the observing officer reached for the envelope, the officer did not have probable cause to arrest defendant at the moment the envelope was seized. *Waters v. United States*, App. D.C., 311 A.2d 835 (1973).

Probable cause insufficient to arrest passenger for unauthorized use of motor vehicle. *United States v. Myles*, 113 WLR 225 (Super. Ct. 1985).

Where police arrived 45 minutes after an accident, arrested the driver who was no longer in her car and administered to the driver a breathalyzer test over her objection, the arrest was invalid since no violation occurred in the presence of the police, and the breathalyzer results must be suppressed. *Schram v. District of Columbia*, App. D.C., 485 A.2d 623 (1984).

Cited in *Miller v. Johnson*, 541 F. Supp. 1165 (D.D.C. 1982); *United States v. Washington*, 110 WLR 617 (Super. Ct. 1982); *United States v. Williams*, 754 F.2d 1001 (D.C. Cir. 1985); *Alston v. United States*, App. D.C., 518 A.2d 439 (1986); *Barnett v. United States*, App. D.C., 525 A.2d 197 (1987); *United States v. Ruther*, 116 WLR 917 (Super. Ct. 1988); *Goldston v. United States*, App. D.C., 562 A.2d 96 (1989); *District of Columbia v. Hobo*, 117 WLR 1133 (Super. Ct. 1989); *United States v. Alston*, 832 F. Supp. 1 (D.D.C. 1993); *Hood v. United States*, App. D.C., 661 A.2d 1081 (1995).

§ 23-582. Arrests without warrant by other persons.

(a) A special policeman shall have the same powers as a law enforcement officer to arrest without warrant for offenses committed within premises to which his jurisdiction extends, and may arrest outside the premises on fresh pursuit for offenses committed on the premises.

(b) A private person may arrest another —

(1) who he has probable cause to believe is committing in his presence —

(A) a felony; or

(B) an offense enumerated in section 23-581 (a) (2); or

(2) in aid of a law enforcement officer or special policeman, or other person authorized by law to make an arrest.

(c) Any person making an arrest pursuant to this section shall deliver the person arrested to a law enforcement officer without unreasonable delay. (July 29, 1970, 84 Stat. 630, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-582; Apr. 30, 1988, D.C. Law 7-104, § 7(e), 35 DCR 147.)

Cross references. — As to appointment and compensation of special policemen, see § 4-114.

Section references. — This section is referred to in § 23-562.

Legislative history of Law 7-104. — Law 7-104, the "Technical Amendments Act of 1987," was introduced in Council and assigned Bill No. 7-346, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 24, 1987 and December 8, 1987, respectively. Signed by the Mayor on December 22, 1987, it was assigned Act No. 7-124 and transmitted to both Houses of Congress for its review.

Intent of Congress. — Congress' intent by

enacting this section was to define and restrict the private citizen's common law right to arrest. *United States v. Lima*, App. D.C., 424 A.2d 113 (1980).

Capitol Police. — Sections 9-115, 9-115.1(c) and *Andersen v. United States*, App. D.C., 132 A.2d 155, aff'd, 253 F.2d 335 (D.C. Cir. 1957), cert. denied, 357 U.S. 930, 78 S. Ct. 1375, 2 L. Ed. 2d 1372 (1958) set the parameters for when members of the Capitol Police can legally make arrests in their capacity as members of the force. Otherwise, when making arrests, members of the Capitol Police stand in the same shoes as ordinary civilians and civilian arrests are regulated by subsection (b) of this section.

United States v. O'Brien, 116 WLR 2117 (Super. Ct. 1988).

Duty to arrest of citizen and police officer distinguishable. — The citizens' freedom from a duty to arrest must be distinguished from that of a police officer in the District of Columbia. United States v. Lima, App. D.C., 424 A.2d 113 (1980).

Security guards are not officials or agents of state. — Neither the licensing of security guards in the District of Columbia, nor the statutory citizen arrest power, serves to make these individuals officials or agents of the state. United States v. Lima, App. D.C., 424 A.2d 113 (1980).

Washington Metropolitan Area Transit Authority police officer's actions in conducting investigatory stop of a nonfelony outside the limits of his jurisdiction cannot be justified as a citizen's arrest. United States v. Foster, 566 F. Supp. 1403 (D.D.C. 1983).

Arrest by private person does not transform that individual into agent of state. —

The fact that a private person makes a citizen's arrest does not automatically transform that individual into an agent of the state. His conduct is not actionable for any deprivation under color of law of rights, privileges or immunities secured by the Constitution. United States v. Lima, App. D.C., 424 A.2d 113 (1980).

Probable cause for employer to detain employee. — Evidence in a false imprisonment action by a former store employee against his former employer showed, as matter of law, that employer had probable cause to detain employee for investigation as to possible discrepancies in employee's department. Lansburgh's, Inc. v. Ruffin, App. D.C., 372 A.2d 561 (1977).

Cited in Miller v. Johnson, 541 F. Supp. 1165 (D.D.C. 1982); Safeway Stores, Inc. v. Kelly, App. D.C., 448 A.2d 856 (1982); Alston v. United States, App. D.C., 518 A.2d 439 (1986); Woodward & Lothrop v. Hillary, App. D.C., 598 A.2d 1142 (1991).

Subchapter VI. Authority to Break and Enter Under Certain Conditions.

§ 23-591. Authority to break and enter under certain conditions.

Repealed. Oct. 26, 1974, 88 Stat. 1455, Pub. L. 93-481, § 4(a); Jan. 3, 1975, 88 Stat. 2178, Pub. L. 93-635, § 16.

CHAPTER 7. EXTRADITION AND FUGITIVES FROM JUSTICE.

Sec. 23-701. Warrants for the arrest of fugitives from justice.	Sec. 23-705. Removal proceedings and returns to foreign countries not affected.
23-702. Procedure on arrest of fugitives.	23-706. Confinement.
23-703. Failure to appear.	23-707. Definitions.
23-704. Extradition.	

§ 23-701. Warrants for the arrest of fugitives from justice.

Whenever any person who is (1) within the District of Columbia, (2) charged with any offense committed in any State, and (3) liable by the Constitution and laws of the United States to be delivered over upon the demand of the Governor of that State, any judge of the Superior Court may, upon complaint on oath or affirmation of any credible witness, setting forth the offense, that the person is a fugitive from justice, and such other matters as are necessary to bring the case within the provisions of law, issue a warrant to bring the person so charged before the Superior Court, to answer the complaint. (July 29, 1970, 84 Stat. 631, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-701.)

Section references. — This section is referred to in § 23-702.

Cited in *United States v. Hardy*, 121 WLR 621 (Super. Ct. 1993).

§ 23-702. Procedure on arrest of fugitives.

(a) Any person arrested upon a warrant issued pursuant to section 23-701, or arrested within the District of Columbia as a fugitive from justice without a warrant having been issued, shall be taken before the Criminal Division of the Superior Court for preliminary examination on a complaint charging him as a fugitive.

(b) If, upon the examination of the person charged, it shall appear to the court that there is reasonable cause to believe that the complaint is true and that the person may be lawfully demanded of the chief judge, the person shall be detained or released according to law, in like manner as if the offense had been committed in the District of Columbia, to appear before the court at a future date, allowing thirty days to obtain a requisition from the Governor of the State from which the person is a fugitive. The complaint of fugitivity from another jurisdiction shall create a presumption that the person is unlikely to appear if released, which may be overcome only by clear and convincing proof.

(c) If the person so released or detained shall appear before the court upon the day ordered, he shall be discharged, unless he shall be demanded by requisition, pursuant to subsection (g) of this section or section 23-704, or unless the court shall find cause to detain or to release him as provided by subsection (b) of this section until a later day; but regardless of whether the person shall be detained or released as provided in subsection (b) of this section or discharged, his delivery to any person authorized by the warrant of the Governor shall be a discharge of any bond or obligation.

(d) The Chief of Police of the Metropolitan Police Department shall give notice to the police official or sheriff of the city or county from which the person is a fugitive that the person is so held in the District of Columbia.

(e) A person detained as provided by this section shall not be detained in jail longer than to allow a reasonable time for the person receiving the notice required by subsection (d) of this section to apply for and obtain a proper requisition for the person detained according to the circumstances of the case and the distance of the place where the offense is alleged to have been committed.

(f)(1) At any time prior to the filing of a requisition, a person arrested pursuant to this section may in open court waive further proceedings pursuant to this chapter.

(2) Following waiver, a judge of the Superior Court may, in his discretion, if the United States attorney consents, release the person upon such conditions as the judge shall deem necessary to insure his appearance before the proper official in the State from which he is a fugitive, and shall otherwise order his return to the jurisdiction of that State in the custody of a proper official.

(3) Following waiver, a person not released pursuant to paragraph (2) of this subsection shall be ordered to return to the jurisdiction from which he is a fugitive in the custody of a proper official, and may be detained to await return.

(4) A person detained pursuant to paragraph (3) of this subsection for more than three days (not including Saturdays, Sundays, and holidays) shall be returned to the court and shall thereupon be released pursuant to paragraph (2) of this subsection, unless the court shall find good reason to extend his detention for an additional three days to obtain the attendance of a proper official of the demanding jurisdiction.

(g) If a person has not waived further proceedings pursuant to subsection (f) of this section, and a requisition from the Governor of the jurisdiction from which the person is a fugitive is presented to the court, the court shall order the requisition to be filed and referred to the chief judge for extradition proceedings pursuant to section 23-704, and shall order the person committed pending those proceedings. (July 29, 1970, 84 Stat. 631, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-702.)

Cross references. — As to bail, see § 16-704 and Chapter 13 of this title.

Section references. — This section is referred to in §§ 23-703 and 23-902.

Cited in United States v. Hardy, 121 WLR 621 (Super. Ct. 1993).

§ 23-703. Failure to appear.

Any person released pursuant to section 23-702 who fails to appear as required shall be punished by a fine not exceeding \$5,000 or imprisonment for not more than five years, or both. (July 29, 1970, 84 Stat. 632, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-703.)

Cited in United States v. Hardy, 121 WLR 621 (Super. Ct. 1993).

§ 23-704. Extradition.

(a) In all cases where the laws of the United States provide that fugitives from justice shall be delivered up, the chief judge of the Superior Court shall cause to be apprehended and delivered up fugitives from justice who shall be found within the District of Columbia, in the same manner and under the same regulations as the executive authority of a State is required to do by the provisions of chapter 209 of Title 18, United States Code, and all executive and judicial officers are required to obey the lawful precepts or other process issued for that purpose, and to aid and assist in that delivery.

(b) The chief judge of the Superior Court may also surrender, on demand of the Governor of any State, any person in the District of Columbia charged in that State in the manner provided in subsection (a) of this section with committing an act in the District of Columbia, or in another State, intentionally resulting in a crime in the State whose executive authority is making the demand, even though the accused was not in that State at the time of the commission of the crime, and has not fled therefrom.

(c) No person apprehended in accordance with the provisions of subsections (a) and (b) of this section shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken before the chief judge of the Superior Court of the District of Columbia who shall inform him of the demand made for his surrender, and of the crime with which he is charged, and that he has the right to demand and procure legal counsel.

(d) If the person or his counsel shall state that he desires to test the legality of the person's arrest, the chief judge shall hold a hearing to determine whether the person shall be delivered over as demanded. At the hearing, the person shall have the same rights to challenge his detention and extradition as if the hearing were upon a writ of habeas corpus.

(e) If the chief judge shall order the person delivered over, he may appeal, within twenty-four hours, from that order to the District of Columbia Court of Appeals if the chief judge who rendered the order, or a judge of the District of Columbia Court of Appeals, issues a certificate of probable cause. The appeal shall be expedited by the District of Columbia Court of Appeals. An application for a writ of habeas corpus on behalf of a person who is authorized to demand a hearing pursuant to this subsection shall not be entertained if it appears that the applicant has failed to demand such a hearing or that the chief judge, after hearing, has ordered him delivered over, unless it also appears that the remedy by hearing is inadequate or ineffective to test the legality of his detention.

(f) Nothing contained in this subsection shall prevent a person from waiving his right to appear before the chief judge of the Superior Court and voluntarily returning in custody of a proper official to the jurisdiction of the State which is demanding him.

(g) No person demanded by the Governor of a State pursuant to this section shall be released upon bond or other obligation except pursuant to an order of a court of the demanding State.

(h) Any associate judge designated by the chief judge or acting chief judge shall have the same power to act pursuant to this section as the chief judge.

(July 29, 1970, 84 Stat. 632, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-704.)

Cross references. — As to representation of indigents, see Chapter 26 of Title 11.

Section references. — This section is referred to in §§ 23-702 and 23-706.

Requirements for granting extradition. — To support a rendition of an accused by the asylum state to the demanding state, it must be shown that he is the individual named in the writ of extradition, he is substantially charged with a crime in the demanding state and he is a fugitive, which is to say he was in the demanding state when the crime was committed. *Martin v. Maryland*, App. D.C., 287 A.2d 823 (1972).

Asylum state will not judge adequacy of indictment. — In an extradition proceeding, courts in the asylum state will not judge the adequacy of the demanding state's indictment or consider issues that may appropriately be raised at trial. *Martin v. Maryland*, App. D.C., 287 A.2d 823 (1972).

Issues surrounding previous arrest and possible suppression of evidence are not proper subject of consideration at extradition proceeding. *Martin v. Maryland*, App. D.C., 287 A.2d 823 (1972).

Hearing on probable cause for arrest not required. — Even if evidence forwarded to a demanding state had been seized in the course of an illegal arrest in the District of Columbia, the Chief Judge of the Superior Court, before ordering extradition, is not required to hold a hearing on the issue of whether there had been probable cause for the arrest in the District of Columbia. *Martin v. Maryland*, App. D.C., 287 A.2d 823 (1972).

Minimal level of competency required to waive or demand hearing. — A minimal level of competency is required before a fugitive-arrestee can make an informed decision to waive or demand an extradition hearing. *United States v. Hardy*, 121 WLR 621 (Super. Ct. 1993).

A competency screening in the context of an extradition matter should be of a limited nature; the only question is whether the arrestee is competent to waive his or her right to demand an extradition hearing. *United States v. Hardy*, 121 WLR 621 (Super. Ct. 1993).

If the government is able to convince the fact-finder by clear and convincing evidence of the identity, fugitivity, and charge of criminality in the demanding state by extrinsic evidence, and if the requisition papers are in order, thus negating the limited defenses to extradition, determination of the arrestee's mental competence is irrelevant; however, if the government does not meet this burden, determination of the arrestee's competence to assist counsel in his or her defense is necessary, and further examination may be warranted. *United States v. Hardy*, 121 WLR 621 (Super. Ct. 1993).

Detainee has same right to challenge detention as on habeas corpus. — In conducting an extradition hearing, the Chief Judge of Superior Court should give a detainee the same rights to challenge his detention and extradition as on a writ of habeas corpus. *Martin v. Maryland*, App. D.C., 287 A.2d 823 (1972).

Extradition proceeding is not a criminal trial but is civil in nature. *Martin v. Maryland*, App. D.C., 287 A.2d 823 (1972).

And Chief Judge carries out executive functions in performing his duties of extradition. *Martin v. Maryland*, App. D.C., 287 A.2d 823 (1972).

Deficient showing of substantial charge in papers of demanding state can be supplemented by the testimony of a person possessing the necessary information in order to make a sufficient showing. *Tucker v. Commonwealth*, App. D.C., 308 A.2d 783 (1973).

Procedural restriction on rendition of juvenile. — The District's consent to rendition of a juvenile to another state under the Interstate Compact on Juveniles cannot properly be exercised by an assistant Corporation Counsel absent express delegation of such power, nor by trial judge. Remand is required to enable the trial court to identify the "compact administrator" under the Compact and to solicit his grant or denial of District's consent to the rendition. *In re G.C.S.*, App. D.C., 360 A.2d 498 (1976).

§ 23-705. Removal proceedings and returns to foreign countries not affected.

Nothing contained in this chapter shall repeal, modify, or in any way affect existing law concerning the procedure for the return of any person apprehended in the District of Columbia to a Federal judicial district to answer a Federal charge, or repeal, modify, or affect existing law or treaty concerning the return to a foreign country of a person apprehended or detained in the

District of Columbia as a fugitive from a foreign country. (July 29, 1970, 84 Stat. 633, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-705.)

§ 23-706. Confinement.

(a) The agent of the demanding State to whom the prisoner may have been delivered in accordance with the provisions of section 23-704, may, when necessary, confine the prisoner in a facility of the District of Columbia Department of Corrections, and the Department of Corrections must receive and safely keep the prisoner for such reasonable time as will enable the officer or person having charge of him to proceed on his route, such officer or person being chargeable with the expense of keeping.

(b) The officer or agent of a demanding State to whom a prisoner may have been delivered following extradition proceedings in another State, or to whom a prisoner may have been delivered after waiving extradition in the other State, and who is passing through the District of Columbia with a prisoner for the purpose of immediately returning the prisoner to the demanding State, may, when necessary, confine the prisoner in a facility of the Department of Corrections. The Department of Corrections must receive and safely keep the prisoner for such reasonable time as will enable the officer or agent to proceed on his route, such officer or agent being chargeable with the expense of keeping. That officer or agent shall produce and show to the Department of Corrections satisfactory written evidence of the fact that he is actually transporting the prisoner to the demanding State after a requisition by the executive authority of the demanding State. The prisoner shall not be entitled to demand a new requisition while in the District of Columbia. (July 29, 1970, 84 Stat. 633, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-706.)

§ 23-707. Definitions.

For purposes of this chapter —

(1) the term “State” includes any territory or possession of the United States; and

(2) the term “Governor” means the executive authority of a State. (July 29, 1970, 84 Stat. 634, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-707.)

CHAPTER 9. FRESH PURSUIT.

Sec.

23-901. Arrests in the District of Columbia by officers of other States.

Sec.

23-902. Hearing; commitment; discharge.
23-903. "Fresh pursuit" defined.

§ 23-901. Arrests in the District of Columbia by officers of other States.

Any member of a duly organized peace unit of any State (or county or municipality thereof) of the United States who enters the District of Columbia in fresh pursuit and continues within the District of Columbia in fresh pursuit of a person in order to arrest him on the ground that he is believed to have committed a felony in such State shall have the same authority to arrest and hold that person in custody as has any member of any duly organized peace unit of the District of Columbia to arrest and hold in custody a person on the ground that he is believed to have committed a felony in the District of Columbia. This section shall not be construed so as to make unlawful any arrest in the District of Columbia which would otherwise be lawful. (July 29, 1970, 84 Stat. 634, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-901.)

Section references. — This section is referred to in §§ 23-581 and 23-902.

§ 23-902. Hearing; commitment; discharge.

If an arrest is made in the District of Columbia by an officer of another State in accordance with the provisions of section 23-901, he shall without unnecessary delay take the person arrested before a judge of the Superior Court of the District of Columbia, who shall conduct a hearing for the purpose of determining the lawfulness of the arrest. If the judge determines that the arrest was lawful, he shall order the release or detention of the person arrested, pursuant to section 23-702, to await for a reasonable time a requisition from the Governor of the State demanding the extradition of the person arrested. If the judge determines that the arrest was unlawful he shall order the person discharged. (July 29, 1970, 84 Stat. 634, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-902.)

Waiver of extradition hearing not voluntary. — In a homicide prosecution, the trial court's finding that the defendant's consent to accompany Maryland officers from District of Columbia, where he was arrested, back to

Maryland without extradition hearing was not voluntary under all circumstances, was not clearly erroneous. *United States v. Holmes*, App. D.C., 380 A.2d 598 (1977).

§ 23-903. "Fresh pursuit" defined.

For purposes of this chapter, the term "fresh pursuit" shall include fresh pursuit as defined by the common law, also the pursuit of a person who has committed a felony or one who the pursuing officer has reasonable grounds to believe has committed a felony. It shall also include the pursuit of a person who the pursuing officer has reasonable grounds to believe has committed a felony,

although no felony has actually been committed, if there is reasonable ground for believing that a felony has been committed. Such term shall not necessarily imply an instant pursuit, but pursuit without unreasonable delay. (July 29, 1970, 84 Stat. 634, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-903; Apr. 30, 1988, D.C. Law 7-104, § 7(f), 35 DCR 147.)

Legislative history of Law 7-104. — Law 7-104, the “Technical Amendments Act of 1987,” was introduced in Council and assigned Bill No. 7-346, which was referred to the Committee of the Whole. The Bill was adopted on first and

second readings on November 24, 1987 and December 8, 1987, respectively. Signed by the Mayor on December 22, 1987, it was assigned Act No. 7-124 and transmitted to both Houses of Congress for its review.

CHAPTER 11. PROFESSIONAL BONDSMEN.

Sec.	Sec.
23-1101. Definitions.	23-1107. Bondsmen prohibited from entering place of detention unless requested by prisoner; record of visit to be kept.
23-1102. Bonding business impressed with public interests.	23-1108. Qualifications of bondsmen; rules to be prescribed by courts; list of agents to be furnished; renewal of authority to act; detailed records to be kept; penalties and disqualifications.
23-1103. Procuring business through official or attorney for a consideration prohibited.	23-1109. Giving advance information of proposed raid prohibited.
23-1104. Attorneys procuring employment through official or bondsman for a consideration prohibited.	23-1110. Designation of official to take bail or collateral when court is not in session; issuance of citations.
23-1105. Receiving other than regular fee for bonding prohibited; bondsmen prohibited from endeavoring to secure dismissal or settlement.	23-1111. Penalties.
23-1106. Posting names of authorized bondsmen; list to be furnished prisoners; prisoners may communicate with bondsmen; record to be kept by police.	23-1112. Enforcement.

§ 23-1101. Definitions.

For purposes of this chapter —

(1) the term “bonding business” means the business of becoming surety for compensation upon bonds in criminal cases in the District of Columbia; and

(2) the term “bondsman” means any person or corporation engaged in the bonding business either as a principal or as an agent, clerk, or representative of another engaged in such business. (July 29, 1970, 84 Stat. 635, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1101.)

Cross references. — As to bail, see § 16-704 and Chapter 13 of this title.

§ 23-1102. Bonding business impressed with public interests.

The bonding business is impressed with a public interest. (July 29, 1970, 84 Stat. 635, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1102.)

§ 23-1103. Procuring business through official or attorney for a consideration prohibited.

It shall be unlawful for any bondsman, either directly or indirectly, to give, donate, lend, contribute, or to promise to give, donate, lend, or contribute any money, property, entertainment, or other thing of value whatsoever to any attorney at law, police officer, deputy United States marshal, jailer, probation officer, clerk, or other attachè of a criminal court, or public official of any character, for procuring or assisting in procuring any person to employ the bondsman to execute as surety any bond for compensation in any criminal case in the District of Columbia. It shall be unlawful for any attorney at law, police officer, deputy United States marshal, jailer, probation officer, clerk, bailiff, or

other attachè of a criminal court, or public official of any character, to accept or receive from a bondsman any money, property, entertainment, or other thing of value whatsoever for procuring or assisting in procuring a person to employ a bondsman to execute as surety any bond for compensation in a criminal case in the District of Columbia. (July 29, 1970, 84 Stat. 635, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1103.)

§ 23-1104. Attorneys procuring employment through official or bondsman for a consideration prohibited.

It shall be unlawful for any attorney at law, either directly or indirectly, to give, loan, donate, contribute, or to promise to give, loan, donate, or contribute any money, property, entertainment, or other thing of value whatsoever to, or to split or divide any fee or commission with, any bondsman, police officer, deputy United States marshal, probation officer, bailiff, clerk, or other attachè of any criminal court for causing or procuring or assisting in causing or procuring a person to employ the attorney to represent him in a criminal case in the District of Columbia. (July 29, 1970, 84 Stat. 635, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1104.)

§ 23-1105. Receiving other than regular fee for bonding prohibited; bondsmen prohibited from endeavoring to secure dismissal or settlement.

It shall be lawful to charge for executing a bond in a criminal case in the District of Columbia, but it shall be unlawful for a bondsman, either directly or indirectly, to charge, accept, or receive a sum of money, or other thing of value, other than the regular fee for bonding, from a person for whom he has executed bond, for any other service whatever performed in connection with any indictment, information, or charge upon which the person is bailed or held in the District of Columbia. It also shall be unlawful for any bondsman to settle, or attempt to settle, or to procure or attempt to procure the dismissal of any indictment, information, or charge against any person in custody or held upon bond in the District of Columbia, with a court, or with the prosecuting attorney in a court in the District of Columbia. (July 29, 1970, 84 Stat. 636, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1105.)

§ 23-1106. Posting names of authorized bondsmen; list to be furnished prisoners; prisoners may communicate with bondsmen; record to be kept by police.

A typewritten or printed list alphabetically arranged of all persons engaged under the authority of any of the courts of criminal jurisdiction in the District of Columbia in the business of becoming surety upon bonds for compensation in criminal cases shall be posted in a conspicuous place in each police precinct,

jail, prisoner's dock, house of detention, and every other place in the District of Columbia in which persons in custody of the law are detained, and one or more copies thereof kept on hand; and when a person who is detained in custody in a place of detention shall request a person in charge thereof to furnish him the name of a bondsman, or to put him in communication with a bondsman, the list shall be furnished to the person in charge of the place of detention within a reasonable time to put the person detained in communication with the bondsman selected, and the person in charge of the place of detention shall contemporaneously with that transaction make in the blotter or book of record kept in the place of detention, a record showing the name of the person requesting the bondsman, the offense with which the person is charged, the time at which the request was made, the bondsman requested, and the person by whom the bondsman was called, and preserve that as a permanent record in the book or blotter in which entered. (July 29, 1970, 84 Stat. 636, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1106.)

§ 23-1107. Bondsmen prohibited from entering place of detention unless requested by prisoner; record of visit to be kept.

It shall be unlawful for a bondsman to enter a police precinct, jail, prisoner's dock, house of detention, or other place where persons in the custody of the law are detained in the District of Columbia for the purpose of obtaining employment as a bondsman, without having been previously called by a person detained or by some relative or other authorized person acting for or on behalf of the person detained. Whenever a bondsman enters a police precinct, jail, prisoner's dock, house of detention, or other place where persons in the custody of the law are detained in the District of Columbia, he shall forthwith give to the person in charge thereof his mission there and the name of the person calling him and requesting him to come to such place. That information shall be recorded by the person in charge of the place of detention and preserved as a public record, and the failure of the bondsman to give that information, or the failure of the person in charge of the place of detention to make and preserve a record of that information, shall constitute a violation of this chapter. (July 29, 1970, 84 Stat. 636, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1107.)

§ 23-1108. Qualifications of bondsmen; rules to be prescribed by courts; list of agents to be furnished; renewal of authority to act; detailed records to be kept; penalties and disqualifications.

(a) It shall be the duty of the United States District Court for the District of Columbia and the Superior Court of the District of Columbia, each, to provide, under reasonable rules and regulations, the qualifications of persons and corporations applying for authority to engage in the bonding business in criminal cases in the District of Columbia, and the terms and conditions upon

which the business shall be carried on, and no person or corporation shall, either as principal, or as agent, clerk, or representative of another, engage in the bonding business in either court until he shall, by order of the court, be authorized to do so. The courts, in making these rules and regulations, and in granting authority to persons to engage in the bonding business, shall take into consideration both the financial responsibility and the moral qualities of the person so applying, and no person shall be permitted to engage, either as principal or agent, in the bonding business, who has ever been convicted of an offense involving moral turpitude, or who is not known to be a person of good moral character. It shall be the duty of each of the courts to require every person qualifying to engage in the bonding business as principal to file with the court a list showing the name, age, and residence of each person employed by the bondsman as agent, clerk, or representative in the bonding business, and require an affidavit from each of these persons stating that he will abide by the terms and provisions of this chapter. Each of the courts shall require the authority of each of those persons to be renewed from time to time at such periods as the court may by rule provide, and before the authority shall be renewed the court shall require from each of those persons an affidavit that since his previous qualification to engage in the bonding business he has abided by the provisions of this chapter, and any person swearing falsely in any of the affidavits shall be guilty of perjury.

(b) Each court shall prescribe such rules and regulations as may be necessary to insure that whenever a bondsman becomes surety for compensation upon a bond in a criminal case before the court, the bondsman shall make a record, which shall be accurate to the best of the maker's knowledge and belief and shall thereafter be open for inspection by the court or its designated representative, and by the designated representative of other law enforcement agencies of the District of Columbia, of the following matters:

(1) the full name and address of the person for whom the bond is executed (referred to in this subsection as the "defendant") and the full name and address of his employer, if any;

(2) the offense with which the defendant is charged;

(3) the name of the court or officer authorizing the defendant's admission to bail;

(4) the amount of the bond;

(5) the name of the person who called the bondsman, if other than the defendant;

(6) the amount of the bondsman's charge for executing the bond;

(7) the full name and address of the person to whom the bondsman presented his bill for the charge;

(8) the full name and address of the person paying the charge; and

(9) the manner of payment of the charge.

Whoever violates any rule or regulation prescribed under this subsection shall be fined not more than \$500 or imprisoned not more than six months, or both, and if he is a bondsman shall be disqualified from thereafter engaging in any manner in the bonding business for such period of time as the trial judge shall order. (July 29, 1970, 84 Stat. 637, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1108.)

Cross references. — As to penalty for perjury, see § 22-2511.

§ 23-1109. Giving advance information of proposed raid prohibited.

It shall be unlawful for any police officer or other public official, in advance of any raid by police or other peace officers or public officials or the execution of any search warrant or warrant of arrest, to give or furnish, either directly or indirectly, any information concerning the proposed raid or arrest to any person engaged in any manner in the bonding business, or to any attorney at law; but it shall not be unlawful for any police or other peace officer, in conducting any raid or in executing any search warrant or warrant of arrest, to communicate to any attorney at law or person engaged in the bonding business, any fact necessary to enable the officer to obtain from the attorney at law or person engaged in the bonding business information necessary to enable the officer to carry out the raid or execute the process. (July 29, 1970, 84 Stat. 638, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1109.)

§ 23-1110. Designation of official to take bail or collateral when court is not in session; issuance of citations.

(a) The judges of the Superior Court of the District of Columbia shall have the authority to appoint some official of the Metropolitan Police Department to act as a clerk of the court with authority to take bail or collateral from persons charged with offenses triable in the Superior Court at all times when the court is not open and its clerks accessible. The official so appointed shall have the same authority at those times with reference to taking bonds or collateral as the clerk of the Municipal Court had on March 3, 1933; shall receive no compensation for these services other than his regular salary; shall be subject to the orders and rules of the Superior Court in discharge of his duties, and may be removed as the clerk at any time by the judges of the court. The United States District Court for the District of Columbia shall have power to authorize the official appointed by the Superior Court to take bond of persons arrested upon writs and process from that court in criminal cases between 4 o'clock postmeridian and 9 o'clock antemeridian and upon Sundays and holidays, and shall have power at any time to revoke the authority granted by it.

(b)(1) An officer or member of the Metropolitan Police Department who arrests without a warrant a person for committing a misdemeanor may, instead of taking him into custody, issue a citation requiring the person to appear before an official of the Metropolitan Police Department designated under subsection (a) of this section to act as a clerk of the Superior Court.

(2) Whenever a person is arrested without a warrant for committing a misdemeanor and is booked and processed pursuant to law, an official of the Metropolitan Police Department designated under subsection (a) of this section to act as a clerk of the Superior Court may issue a citation to him for an appearance in court or at some other designated place, and release him from custody.

(3) No citation may be issued under paragraph (1) or (2) unless the person authorized to issue the citation has reason to believe that the arrested person will not cause injury to persons or damage to property and that he will make an appearance in answer to the citation.

(4) Whoever willfully fails to appear as required in a citation, shall be fined not more than the maximum provided for the misdemeanor for which such citation was issued or imprisoned for not more than 180 days, or both. Prosecution under this paragraph shall be by the prosecuting officer responsible for prosecuting the offense for which the citation is issued. (July 29, 1970, 84 Stat. 638, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1110; Aug. 20, 1994, D.C. Law 10-151, § 101(a), 41 DCR 2608.)

Effect of amendments. — D.C. Law 10-151 substituted “180 days” for “one year” in (b)(4).

Emergency act amendments. — For temporary amendment of section, see § 101(a) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — Law 10-151, the “Omnibus Criminal Justice Reform Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

Authority to accept bond. — Ordinarily a person arrested for an offense for which he may post bond or collateral is brought immediately to the Superior Court for that purpose, and if Superior Court is not in session, the

stationhouse clerks who have the function of “booking” offenders serve also as acting clerks of the Superior Court and are therefore authorized to accept collateral or bond, but such stationhouse clerks have no discretion to either increase or decrease the amount of bond or collateral required by court rules. *United States v. Robinson*, 471 F.2d 1082 (D.C. Cir. 1972), rev’d on other grounds, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973).

It was error to order police officials to formulate a comprehensive manual of policies to be followed in dealing with mass demonstrations absent showing that police officials directed, authorized or approved use of excessive force, that it was policy to detain prisoners an unreasonable time or deny them adequate medical treatment or that delay in booking was due to anything other than a great number of arrests in prior demonstrations, notwithstanding that in individual cases mistakes may have been made. *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107 (D.C. Cir. 1977).

§ 23-1111. Penalties.

Any person violating any provision of this chapter shall be fined not less than \$50 nor more than \$100, or imprisoned for not less than ten nor more than sixty days, or both, where no other penalty is provided by this chapter; and if the person so convicted is (1) a police officer or other public official, he shall upon recommendation of the trial judge also be forthwith dismissed from office, (2) a bondsman, he shall be disqualified from thereafter engaging in any manner in the bonding business for such a period of time as the trial judge shall order, or (3) an attorney at law, he shall be subject to suspension or disbarment as attorney at law. (July 29, 1970, 84 Stat. 639, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1111.)

§ 23-1112. Enforcement.

It shall be the duty of the Superior Court and of the United States District Court for the District of Columbia to see that this chapter is enforced, and upon

the impaneling of each grand jury in the District of Columbia it shall be the duty of the judge impaneling such jury to charge it to investigate the manner in which this chapter is enforced and all violations thereof in connection with the matter under investigation by such jury. (July 29, 1970, 84 Stat. 639, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1112.)

CHAPTER 13. BAIL AGENCY [PRETRIAL SERVICES AGENCY] AND PRETRIAL DETENTION.

Subchapter I. District of Columbia Bail Agency [Pretrial Services Agency].

- Sec.
- 23-1301. District of Columbia Pretrial Services Agency.
- 23-1302. Definitions.
- 23-1303. Interviews with detainees; investigations and reports; information as confidential; consideration and use of reports in making bail determinations.
- 23-1304. Executive committee; composition; appointment and qualifications of Director.
- 23-1305. Duties of Director; compensation; tenure.
- 23-1306. Chief assistant and other agency personnel; compensation.
- 23-1307. Annual reports to executive committee, Congress, and Mayor.
- 23-1308. Budget estimates.
- 23-1309. References to "Bail Agency" deemed to be to "Pretrial Services Agency."

Subchapter II. Release and Pretrial Detention

- Sec.
- 23-1321. Release prior to trial.
- 23-1322. Detention prior to trial.
- 23-1323. Detention of addict.
- 23-1324. Appeal from conditions of release.
- 23-1325. Release in first degree murder and assault with intent to kill while armed cases or after conviction.
- 23-1326. Release of material witnesses.
- 23-1327. Penalties for failure to appear.
- 23-1328. Penalties for offenses committed during release.
- 23-1329. Penalties for violation of conditions of release.
- 23-1330. Contempt.
- 23-1331. Definitions.
- 23-1332. Applicability of subchapter.
- 23-1333. Consideration of juvenile history.

Subchapter I. District of Columbia Bail Agency [Pretrial Services Agency].

§ 23-1301. District of Columbia Pretrial Services Agency.

The District of Columbia Pretrial Services Agency (hereafter in this subchapter referred to as the "agency") shall continue in the District of Columbia and shall secure pertinent data and provide for any judicial officer in the District of Columbia or any officer or member of the Metropolitan Police Department issuing citations, reports containing verified information concerning any individual with respect to whom a bail or citation determination is to be made. (July 29, 1970, 84 Stat. 639, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1301; Sept. 27, 1978, 92 Stat. 753, Pub. L. 95-388, §§ 1, 2.)

Cross references. — As to bail and collateral security, see § 16-704.

Agency exclusively subject to § 23-1303(d). — The D.C. Pretrial Services Agency is exclusively subject to § 23-1303(d). United

States v. Cicero, 22 F.3d 1156 (D.C. Cir.), cert. denied, — U.S. —, 115 S. Ct. 270, 130 L. Ed. 2d 188 (1994).

Cited in Warren v. United States, App. D.C., 436 A.2d 821 (1981).

§ 23-1302. Definitions.

As used in this chapter —

(1) the term "judicial officer" means, unless otherwise indicated, the Supreme Court of the United States, the United States Court of Appeals for the District of Columbia Circuit, the District of Columbia Court of Appeals, United States District Court for the District of Columbia, the Superior Court of the

District of Columbia or any justice or judge of those courts or a United States commissioner or magistrate; and

(2) the term "bail determination" means any order by a judicial officer respecting the terms and conditions of detention or release (including any order setting the amount of bail bond or any other kind of security) made to assure the appearance in court of —

(A) any person arrested in the District of Columbia; or

(B) any material witness in any criminal proceeding in a court referred to in paragraph (1) of this section. (July 29, 1970, 84 Stat. 640, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1302.)

Section references. — This section is referred to in § 23-1303.

§ 23-1303. Interviews with detainees; investigations and reports; information as confidential; consideration and use of reports in making bail determinations.

(a) The agency shall, except when impracticable, interview any person detained pursuant to law or charged with an offense in the District of Columbia who is to appear before a judicial officer or whose case arose in or is before any court named in section 23-1302 (1). The interview, when requested by a judicial officer, shall also be undertaken with respect to any person charged with intoxication or a traffic violation. The agency shall seek independent verification of information obtained during the interview, shall secure any such person's prior criminal record which shall be made available by the Metropolitan Police Department, and shall prepare a written report of the information for submission to the appropriate judicial officer. The report to the judicial officer shall, where appropriate, include a recommendation as to whether such person should be released or detained under any of the conditions specified in subchapter II of this chapter. If the agency does not make a recommendation, it shall submit a report without recommendation. The agency shall provide copies of its report and recommendations (if any) to the United States attorney for the District of Columbia or the Corporation Counsel of the District of Columbia, and to counsel for the person concerning whom the report is made. The report shall include but not be limited to information concerning the person accused, his family, his community ties, residence, employment, and prior criminal record, and may include such additional verified information as may become available to the agency.

(b) With respect to persons seeking review under subchapter II of this chapter of their detention or conditions of release, the agency shall review its report, seek and verify such new information as may be necessary, and modify or supplement its report to the extent appropriate.

(c) The agency, when requested by any appellate court or a judge or justice thereof, or by any other judicial officer, shall furnish a report as provided in subsection (a) of this section respecting any person whose case is pending

before any such appellate court or judicial officer or in whose behalf an application for a bail determination shall have been submitted.

(d) Any information contained in the agency's files, presented in its report, or divulged during the course of any hearing shall not be admissible on the issue of guilt in any judicial proceeding, but such information may be used in proceedings under sections 23-1327, 23-1328, and 23-1329, in perjury proceedings, and for the purposes of impeachment in any subsequent proceeding.

(e) The agency, when requested by a member or officer of the Metropolitan Police Department acting pursuant to court rules governing the issuance of citations in the District of Columbia, shall furnish to such member or officer a report as provided in subsection (a).

(f) The preparation and the submission by the agency of its report as provided in this section shall be accomplished at the earliest practicable opportunity.

(g) A judicial officer in making a bail determination shall consider the agency's report and its accompanying recommendation, if any. The judicial officer may order such detention or may impose such terms and set such conditions upon release, including requiring the execution of a bail bond with sufficient solvent sureties as shall appear warranted by the facts, except that such judicial officer may not order any detention or establish any term or condition for release not otherwise authorized by law.

(h) The agency shall —

(1) supervise all persons released on nonsurety release, including release on personal recognizance, personal bond, nonfinancial conditions, or cash deposit or percentage deposit with the registry of the court;

(2) make reasonable effort to give notice of each required court appearance to each person released by the court;

(3) serve as coordinator for other agencies and organizations which serve or may be eligible to serve as custodians for persons released under supervision and advise the judicial officer as to the eligibility, availability, and capacity of such agencies and organizations;

(4) assist persons released pursuant to subchapter II of this chapter in securing employment or necessary medical or social services;

(5) inform the judicial officer and the United States attorney for the District of Columbia or the Corporation Counsel of the District of Columbia of any failure to comply with pretrial release conditions or the arrest of persons released under its supervision and recommend modifications of release conditions when appropriate;

(6) prepare, in cooperation with the United States marshal for the District of Columbia and the United States attorney for the District of Columbia, such pretrial detention reports as are required by Rule 46 (h) of the Federal Rules of Criminal Procedure; and

(7) perform such other pretrial functions as the executive committee may, from time to time, assign. (July 29, 1970, 84 Stat. 640, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1303.)

Statements made to the Pretrial Services Agency were not privileged and confidential and therefore could be used by the prosecutor to impeach him. *Hall v. United States*, App. D.C., 540 A.2d 442 (1988).

Confidentiality not extended to facts otherwise of record. — The confidentiality provision of subsection (d) of this section does not encompass facts otherwise of official record simply because of their inclusion in the report. *Haltiwaner v. United States*, App. D.C., 377 A.2d 1142 (1977).

Defendant was properly impeached by use of prior inconsistent statement given by him to a representative of the agency in the prosecution of offense for which the bail agency statement was given. *Herbert v. United States*, App. D.C., 340 A.2d 802 (1975).

And by use of information concerning prior conviction. — A defendant was properly impeached with information concerning prior conviction even though his admission of the prior conviction was made on a form prepared for the agency. *Anderson v. United States*, App. D.C., 352 A.2d 392 (1976).

Stipulation as to impeachment testimony binding. — A stipulation as to impeachment testimony to be offered by an employee of the agency regarding certain statements made to him by the defendant after arrest was binding on the defendant, notwithstanding contention that this section prohibits use of any information given agency for purpose of impeachment at trial. *Cowan v. United States*, App. D.C., 331 A.2d 323 (1975).

Effect of government's failure to make detention reports. — Failure of the government to comply with the rule requiring the attorney for government to make a biweekly

report to court listing each defendant held pending trial for a period in excess of 10 days and to state the reasons why such defendants were still being held in custody cancelled any negative effect that defendants' failure to assert right to speedy trial formally until day of trial might have had on validity of the speedy trial claim. *United States v. Cooper*, 504 F.2d 260 (D.C. Cir. 1974).

Record on appeal inadequate for consideration of motion to withdraw guilty plea.

— The record on appeal from denial of a motion to withdraw guilty pleas, raising serious unanswered questions about whether defendant's decision to plead was materially affected by defense counsel's failure to seek an independent mental examination of defendant, or to call the psychiatrist to testify, or the influence of ex parte communications between U.S. Attorney and examining staff, or psychiatrists' failure to file promptly his letters, or court's failure to inquire into circumstances surrounding the examination, was inadequate for proper consideration of court's reasons for denying the motion. *United States v. Morgan*, 482 F.2d 786 (D.C. Cir. 1973).

Public telephone numbers admissible.

— This section does not prevent the admission of information that is in the public record; thus, because phone numbers were publicly available as part of the district court's files, they were not protected by subsection (d) of this section. *United States v. Cicero*, 22 F.3d 1156 (D.C. Cir.), cert. denied, — U.S. —, 115 S. Ct. 270, 130 L. Ed. 2d 188 (1994).

Cited in *Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978); *In re Rosen*, App. D.C., 470 A.2d 292 (1983); *Jackson v. Scott*, App. D.C., 667 A.2d 1365 (1995).

§ 23-1304. Executive committee; composition; appointment and qualifications of Director.

(a) The agency shall function under the authority of and be responsible to an executive committee of 9 members of which 5 members shall constitute a quorum. The executive committee shall be composed of 5 persons appointed by the Mayor of the District of Columbia with the advice and consent of the Council of the District of Columbia, the Chief Judge of the United States Court of Appeals for the District of Columbia Circuit or his or her designee, the Chief Judge of the United States District Court for the District of Columbia or his or her designee, the Chief Judge of the District of Columbia Court of Appeals or his or her designee, and the Chief Judge of the Superior Court of the District of Columbia or his or her designee. Each member appointed by the Mayor shall serve for a 3-year term, which shall begin on the date that a majority of these members are sworn in. This date shall be the anniversary date for all subsequent Mayoral appointments.

(b) The executive committee shall appoint a Director of the agency who shall be a member of the bar of the District of Columbia. (July 29, 1970, 84 Stat. 641, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1304; Feb. 28, 1987, D.C. Law 6-199, § 2, 34 DCR 519; Oct. 7, 1987, D.C. Law 7-31, § 9, 34 DCR 3789.)

Legislative history of Law 6-199. — Law 6-199, the “District of Columbia Pretrial Services Agency Executive Committee Act of 1986,” was introduced in Council and assigned Bill No. 6-443, which was referred to the Committee on Judiciary. The Bill was adopted on first and second readings on November 25, 1986 and December 16, 1986, respectively. Signed by the Mayor on January 8, 1987, it was assigned Act No. 6-258 and transmitted to both Houses of Congress for its review.

Legislative history of Law 7-31. — Law 7-31, the “Boards and Commissions Amendment Act of 1987,” was introduced in Council and assigned Bill No. 7-139, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on April 14, 1987 and May 5, 1987, respectively. Signed by the Mayor on June 1, 1987, it was assigned Act No. 7-26 and transmitted to both Houses of Congress for its review.

§ 23-1305. Duties of Director; compensation; tenure.

The Director of the agency shall be responsible for the supervision and execution of the duties of the agency. The Director shall receive such compensation as may be set by the executive committee but not in excess of the compensation authorized for GS-16 of the General Schedule contained in section 5332 of title 5, United States Code. The Director shall hold office at the pleasure of the executive committee. (July 29, 1970, 84 Stat. 642, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1305.)

§ 23-1306. Chief assistant and other agency personnel; compensation.

The Director, subject to the approval of the executive committee, shall employ a chief assistant and such assisting and clerical staff and may make assignments of such agency personnel as may be necessary properly to conduct the business of the agency. The staff of the agency, other than clerical, shall be drawn from law students, graduate students, or such other available sources as may be approved by the executive committee. The chief assistant to the Director shall receive compensation as may be set by the executive committee, but in an amount not in excess of the amount authorized for GS-14 of the General Schedule contained in section 5332 of Title 5, United States Code, and shall hold office at the pleasure of the executive committee. All other employees of the agency shall receive compensation, as set by the executive committee, which shall be comparable to levels of compensation established in such chapter 53. From time to time, the Director, subject to the approval of the executive committee, may set merit and longevity salary increases. (July 29, 1970, 84 Stat. 642, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1306.)

Section references. — This section is referred to in § 1-612.16.

§ 23-1307. Annual reports to executive committee, Congress, and Mayor.

The Director shall on June 15 of each year submit to the executive committee a report as to the agency's administration of its responsibilities for the previous period of June 1 through May 31, a copy of which report will be transmitted by the executive committee to the Congress of the United States, and to the Mayor of the District of Columbia. The Director shall include in his report, to be prepared as directed by the Mayor of the District of Columbia, a statement of financial condition, revenues, and expenses for the past June 1 through May 31 period. (July 29, 1970, 84 Stat. 642, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1307; Apr. 30, 1988, D.C. Law 7-104, § 7(g), 35 DCR 147.)

Legislative history of Law 7-104. — Law 7-104, the "Technical Amendments Act of 1987," was introduced in Council and assigned Bill No. 7-346, which was referred to the Committee of the Whole. The Bill was adopted on first and

second readings on November 24, 1987 and December 8, 1987, respectively. Signed by Mayor on December 22, 1987, it was assigned Act No. 7-124 and transmitted to both Houses of Congress for its review.

§ 23-1308. Budget estimates.

Budget estimates for the agency shall be prepared by the Director and shall be subject to the approval of the executive committee. (July 29, 1970, 84 Stat. 642, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1308.)

§ 23-1309. References to "Bail Agency" deemed to be to "Pretrial Services Agency."

Any reference in any law, rule, regulation, document, or record of the United States or the District of Columbia to the District of Columbia Bail Agency shall be deemed to be a reference to the District of Columbia Pretrial Services Agency. (1973 Ed., § 23-1309; Sept. 27, 1978, 92 Stat. 753, Pub. L. 95-388, § 3.)

Congressional intent. — Congress expressed no intent to bring the D.C. Bail Agency within the purview of the compromise in confidentiality language, which by its terms applied

to pretrial services agencies. *United States v. Cicero*, 22 F.3d 1156 (D.C. Cir.), cert. denied, — U.S. —, 115 S. Ct. 270, 130 L. Ed. 2d 188 (1994).

Subchapter II. Release and Pretrial Detention.

§ 23-1321. Release prior to trial.

(a) Upon the appearance before a judicial officer of a person charged with an offense, other than murder in the first degree or assault with intent to kill while armed, which shall be treated in accordance with the provisions of § 23-1325, the judicial officer shall issue an order that, pending trial, the person be:

(1) Released on personal recognizance or upon execution of an unsecured appearance bond under subsection (b) of this section;

(2) Released on a condition or combination of conditions under subsection (c) of this section;

(3) Temporarily detained to permit revocation of conditional release under § 23-1322; or

(4) Detained under § 23-1322(b).

(b) The judicial officer shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a local, state, or federal crime during the period of release, unless the judicial officer determines that the release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

(c)(1) If the judicial officer determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, the judicial officer shall order the pretrial release of the person subject to the:

(A) Condition that the person not commit a local, state, or federal crime during the period of release; and

(B) Least restrictive further condition, or combination of conditions, that the judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition or combination of conditions that the person during the period of release shall:

(i) Remain in the custody of a designated person or organization that agrees to assume supervision and to report any violation of a condition of release to the court, if the designated person or organization is able to reasonably assure the judicial officer that the person will appear as required and will not pose a danger to the safety of any other person or the community;

(ii) Maintain employment, or, if unemployed, actively seek employment;

(iii) Maintain or commence an educational program;

(iv) Abide by specified restrictions on personal associations, place of abode, or travel;

(v) Avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(vi) Report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

(vii) Comply with a specified curfew;

(viii) Refrain from possessing a firearm, destructive device, or other dangerous weapon;

(ix) Refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner; the terms “narcotic drug” and “controlled substance” shall have the same meaning as in section 102 of the District of Columbia Uniform Controlled Substances Act of 1981, effective August 5, 1981, (D.C. Law 4-29; D.C. Code § 33-501);

(x) Undergo medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, if available, and remain in a specified institution if required for that purpose;

(xi) Return to custody for specified hours following release for employment, schooling, or other limited purposes;

(xii) Execute an agreement to forfeit upon failing to appear as required, the designated property, including money, as is reasonably necessary to assure the appearance of the person as required, and post with the court the indicia of ownership of the property, or a percentage of the money as the judicial officer may specify;

(xiii) Execute a bail bond with solvent sureties in whatever amount is reasonably necessary to assure the appearance of the person as required; or

(xiv) Satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

(2) In considering the conditions of release described in paragraph (1)(B)(xii) or (xiii) of this subsection, the judicial officer may upon his own motion, or shall upon the motion of the government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation or the use as collateral of property that, because of its source, will not reasonably assure the appearance of the person as required.

(3) A judicial officer may not impose a financial condition under paragraph (1)(B)(xii) or (xiii) of this subsection to assure the safety of any other person or the community, but may impose such a financial condition to reasonably assure the defendant's presence at all court proceedings that does not result in the preventive detention of the person, except as provided in § 23-1322(b).

(4) A person for whom conditions of release are imposed and who, after 24 hours from the time of the release hearing, continues to be detained as a result of inability to meet the conditions of release, shall upon application be entitled to have the conditions reviewed by the judicial officer who imposed them. Unless the conditions of release are amended and the person is thereupon released, on another condition or conditions, the judicial officer shall set forth in writing the reasons for requiring the conditions imposed. A person who is ordered released on a condition that requires that the person return to custody after specified hours shall, upon application, be entitled to a review by the judicial officer who imposed the condition. Unless the requirement is removed and the person is released on another condition or conditions, the judicial officer shall set forth in writing the reasons for continuing the requirement. In the event that the judicial officer who imposed the conditions of release is not available, any other judicial officer may review the conditions.

(5) The judicial officer may at any time amend the order to impose additional or different conditions of release. (July 29, 1970, 84 Stat. 642, Pub. L. 91-358, title II, § 210(a); 1973, Ed., § 23-1321; Sept. 17, 1982, D.C. Law 4-152, §§ 2, 5, 29 DCR 3479; July 3, 1992, D.C. Law 9-125, § 2, 39 DCR 2134; Aug. 20, 1994, D.C. Law 10-151, § 601, 41 DCR 2608.)

Cross references. — As to bail and collateral security, see § 16-704.

Section references. — This section is referred to in §§ 23-1322 to 23-1326, 23-1328 and 23-1329.

Effect of amendments. — D.C. Law 10-151, in (c)(3), substituted the language beginning with “to assure the safety” for “that results in the pretrial detention of the person.”

Emergency act amendments. — For temporary amendment of section, see § 601 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 4-152. — Law 4-152, the “District of Columbia Bail Amendment Act of 1982,” was introduced in Council and assigned Bill No. 4-127, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on July 6, 1982 and July 20, 1982, respectively. Signed by the Mayor on July 21, 1982, it was assigned Act No. 4-223 and transmitted to both Houses of Congress for its review.

Legislative history of Law 9-125. — Law 9-125, the “Bail Reform Amendment Act of 1992,” was introduced in Council and assigned Bill No. 9-360, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on February 4, 1992, and March 3, 1992, respectively. Signed by the Mayor on March 20, 1992, it was assigned Act No. 9-170 and transmitted to both Houses of Congress for its review. D.C. Law 9-125 became effective on July 3, 1992.

Legislative history of Law 10-151. — Law 10-151, the “Omnibus Criminal Justice Reform Amendment Act of 1994,” was introduced in Council and assigned Bill No. 10-98, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on March 29, 1994, and April 12, 1994, respectively. Signed by the Mayor on May 4, 1994, it was assigned Act No. 10-238 and transmitted to both Houses of Congress for its review. D.C. Law 10-151 became effective on August 20, 1994.

Editor’s notes. — The bracketed material in (c)(1)(B)(ix) was inserted by the publisher.

This subchapter does not violate due process on the basis that it is impermissibly vague and uncertain for failure to delimit with precision the term “release.” *Tansimore v. United States*, App. D.C., 355 A.2d 799 (1976).

Trial court judges empowered to modify or revoke pretrial bail. — While subsequent bail matters may be brought before the commissioners, the trial court judges possess authority to take action modifying or revoking pretrial bail. *Clotterbuck v. United States*, App. D.C., 459 A.2d 134 (1983).

Superior Court Criminal Rule 117 cannot divest this power. — Superior Court

Criminal Rule 117, creating a system of hearing commissioners in Superior Court, cannot divest judges of the Superior Court of their plenary power respecting bail. *Clotterbuck v. United States*, App. D.C., 459 A.2d 134 (1983).

Superior Court judge may modify conditions of release imposed by hearing commissioner. — A Superior Court judge does possess authority to modify conditions of release originally imposed by a Superior Court hearing commissioner. *Clotterbuck v. United States*, App. D.C., 459 A.2d 134 (1983).

Intent of subsection (f). — Subsection (f)’s provision that a judicial officer who orders release “may at any time amend his order to impose additional or different conditions of release” is permissive and intended simply to ensure that as a criminal case progresses after presentment the original judicial officer, be he a hearing commissioner or a Superior Court judge, retains bail authority but not to the exclusion of another judge who has more immediate responsibility for the case. *Clotterbuck v. United States*, App. D.C., 459 A.2d 134 (1983).

Judge must state reasons for rejection of request for “less onerous” release conditions. — A Superior Court judge is free to reject a request for “less onerous” release conditions if justification exists in his view, but reasons for rejection must be stated. *Clotterbuck v. United States*, App. D.C., 459 A.2d 134 (1983).

Indictment following release pursuant to § 23-102. — When a defendant entitled to or actually granted relief pursuant to § 23-102 is thereafter indicted, his liberty cannot be restricted to the extent authorized by § 23-1325(a), unless, following a de novo hearing, the court finds that the defendant would either fail to appear at future court proceedings or could pose a danger to the community if released. *Price v. United States*, App. D.C., 476 A.2d 644 (1984).

Priority for defendants unable to make bond. — It will be practice of Superior Court, in the interest of the efficient and fair administration of justice, with due regard to the liberty interest of those persons accused of crimes, to give priority on the calendar to defendants who are imprisoned because of their inability to make bond. *United States v. Morgan*, 116 WLR 641 (Super. Ct. 1988).

Requirements were reasonably calculated and least restrictive means to secure defendant’s appearance. — In view of defendant’s absence of ties to the community, unknown record outside of District of Columbia, and unwillingness to reveal his true identity, requirements were reasonably calculated and least restrictive means available to secure the appearance of the defendant at future scheduled court proceedings. *United States v. Morgan*, 116 WLR 641 (Super. Ct. 1988).

Money bond may not be used to assure detention. Villines v. United States, App. D.C., 312 A.2d 304 (1973), *aff'd*, App. D.C., 320 A.2d 313 (1974).

Amount of bond. — If a money bond is to be used to assure appearance, it need not be set at an amount which the accused can afford. Ireland v. United States, App. D.C., 406 A.2d 1259 (1979).

The trial court is not required to impose a money bail which will guarantee a defendant's pretrial liberty. Ireland v. United States, App. D.C., 406 A.2d 1259 (1979).

Custodial release should be considered. — Particularly when requested by accused, some form of third party custody should be explored and rationally imposed or rejected before a monetary bond is selected. Jones v. United States, App. D.C., 347 A.2d 399 (1975).

Unless one of the exceptions have been met, upon expiration of the statutory 100-day period, or of the additional time extended up to a total of 120 days, the defendant must be treated in accordance with the release provisions of this section: Once the 100 days expired, absent a request by the government to extend his detention, the trial court was required to reconsider his bond status under § 23-1322(h)(2). Best v. United States, App. D.C., 651 A.2d 790 (1994).

But such release need not be immediate. — The setting of third party custody and the intensity thereof as a condition of pretrial release need not immediately result in release because the custodian obtained, as well as the degree of supervision undertaken, must be acceptable to the court before release is permitted. Jones v. United States, App. D.C., 347 A.2d 399 (1975).

Custodial release authorized for preparation of defense. — Where a limited custodial release offered the only means by which a defendant could present a viable defense to second degree murder charge, a good faith representation by the defendant that there were witnesses who could exculpate him but although he knew such witnesses by sight he did not know them by name was sufficient showing of good cause to warrant limited release of defendant. United States v. Reese, 463 F.2d 830 (D.C. Cir. 1972).

Unless compelling reasons exist for denying release. — When denial of custodial release in order to obtain witnesses may deprive defendant of his only opportunity to establish his claim of defense, bona fide representation as to the character of the defense sought to be established should be accommodated unless outweighed by compelling reasons for denying release. United States v. Reese, 463 F.2d 830 (D.C. Cir. 1972).

After balancing defendant's opportunity for release against safety and risk factors. — It is for the court, with the aid of the parties,

to work out questions of judgment involved in balancing opportunity of an incarcerated defendant to be released in order to search for witnesses against the need to take into account the safety of his custodians and to guard against the risk of flight. United States v. Reese, 463 F.2d 830 (D.C. Cir. 1972).

Defendant's cooperation considered in determining type and length of release. — The degree of cooperation with respect to discovery between the government and a defendant who seeks custodial release in order to seek witnesses is to be taken into consideration as to the type and length of custodial release appropriate. United States v. Reese, 463 F.2d 830 (D.C. Cir. 1972).

Conditional release should be considered. — Superior Court has the authority to release defendant, provided that he is able to meet the difficult task of showing that he is entitled to release. United States v. Flynn, 122 WLR 1021 (Super. Ct. 1994).

Denial of conditional release did not inhibit defense. — A motion for conditional release which added nothing to general averment of previously denied motion, offered only a bare demand for release in order that defendant might participate in preparation for trial, was silent as to precise manner in which defendant's unrelieved incarceration would prohibit his effective assistance in development of defense, and did not offer specific allegations of fact which, if proven, would have demonstrated good cause for affording requested relief, was properly denied by trial court, and defendant was not improperly inhibited in presentation of his defense by such denial. Perry v. United States, App. D.C., 364 A.2d 617 (1976).

Violations of pretrial release orders. — The legislative history of § 23-1329 does not reveal an intent by Congress to override the unlimited sentencing provision of § 11-944 in cases involving violations of conditions of pretrial release under this section. Caldwell v. United States, App. D.C., 595 A.2d 961 (1991).

Section 11-944 operates independently of and in addition to § 23-1329(c), so that the sentencing limit of 6-months' imprisonment and \$1,000 does not apply to convictions for violations of a pretrial release order constituting contempt under § 11-944. Caldwell v. United States, App. D.C., 595 A.2d 961 (1991).

Remand where bail excessive. — Although an accused charged with grand larceny and released on a personal recognizance bond allegedly threatened a witness and was arrested on charge of obstructing justice, setting of a surety bond of \$5,000 is not justified on theory that, in view of the serious nature of the pending charges, and the unemployment of the accused, the accused was unreliable and unlikely to abide by nonfinancial conditions of release. The case must be remanded for pro-

ceedings on issue of pretrial detention or appropriate conditions of release. *Jones v. United States*, App. D.C., 347 A.2d 399 (1975).

Remand to supplement record. — Where the trial court set secured money bonds of \$10,000 each for 2 defendants charged with murder during the perpetration of robbery, but the record did not contain full information concerning the nature and circumstances of the offense and why other conditions of release would not be suitable, proceedings on appeal after defendants' motions for review of bond had been overruled would be remanded for supplementation of record by complete statement by trial court on those matters or, if trial court deemed it appropriate, entry of new orders respecting pretrial bail. *Bouknight v. United States*, App. D.C., 305 A.2d 524 (1973).

Cited in *Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978); *Daniel v. United States*, App.

D.C., 408 A.2d 1231 (1979); *United States v. Alston*, App. D.C., 412 A.2d 351 (1980); *United States v. Edwards*, App. D.C., 430 A.2d 1321 (1981), cert. denied, 454 U.S. 1022, 102 S. Ct. 1721, 72 L. Ed. 2d 141 (1982); *In re Stanton*, App. D.C., 470 A.2d 281 (1983), cert. denied, 466 U.S. 972, 104 S. Ct. 2347, 80 L. Ed. 2d 821 (1984); *In re Rosen*, App. D.C., 470 A.2d 292 (1983); *Hazel v. United States*, App. D.C., 483 A.2d 1157 (1984); *Berry v. District of Columbia*, 833 F.2d 1031 (D.C. Cir. 1987); *United States v. Cooper*, 115 WLR 1741 (Super. Ct. 1987); *Horton v. United States*, App. D.C., 591 A.2d 1280 (1991); *Kleinbart v. United States*, App. D.C., 604 A.2d 861 (1992); *United States v. Moore*, 120 WLR 1461 (Super. Ct. 1992); *United States v. Boyd*, 120 WLR 1473 (Super. Ct. 1992); *United States v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993).

§ 23-1322. Detention prior to trial.

(a) The judicial officer shall order the detention of a person charged with an offense for a period of not more than 5 days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the government to notify the appropriate court, probation or parole official, or local or state law enforcement official, if the judicial officer determines that the person charged with an offense:

(1) Was at the time the offense was committed, on:

(A) Release pending trial for a felony under local, state, or federal law;

(B) Release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under local, state, or federal law; or

(C) Probation or parole for an offense under local, state, or federal law; and

(2) May flee or pose a danger to any other person or the community. If the official fails or declines to take the person into custody during the 5-day period described in this subsection, the person shall be treated in accordance with other provisions of law governing release pending trial.

(b)(1) The judicial officer shall hold a hearing to determine whether any condition or combination of conditions set forth in § 23-1321(c) will reasonably assure the appearance of the person as required and the safety of any other person and the community, upon oral motion of the attorney for the government, in a case that involves:

(A) A crime of violence, or a dangerous crime, as these terms are defined in § 23-1331;

(B) An offense under section 502 of the District of Columbia Theft and White Collar Crimes Act of 1982, effective December 1, 1982 (D.C. Law 4-164; D.C. Code § 22-722);

(C) A serious risk that the person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate a prospective witness or juror; and

(D) A serious risk that the person will flee.

(2) If, after a hearing pursuant to the provision of subsection (d) of this section, the judicial officer finds by clear and convincing evidence that no condition or combination of conditions will reasonably assure the appearance of the person as required, and the safety of any other person and the community, the judicial officer shall order that the person be detained before trial.

(c) There shall be a rebuttable presumption that no condition or combination of conditions of release will reasonably assure the safety of any other person and the community if the judicial officer finds by a substantial probability that the person:

(1) Committed a dangerous crime or a crime of violence, as these crimes are defined in § 23-1331, while armed with or having readily available a pistol, firearm, or imitation firearm;

(2) Has threatened, injured, intimidated, or attempted to threaten, injure, or intimidate a law enforcement officer, an officer of the court, or a prospective witness or juror in any criminal investigation or judicial proceeding;

(3) Committed a dangerous crime or a crime of violence, as these terms are defined in § 23-1331, and has previously been convicted of a dangerous crime or a crime of violence which was committed while on release pending trial for a local, state, or federal offense; or

(4) Committed a dangerous crime or a crime of violence while on release pending trial for a local, state, or federal offense.

(d)(1) The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the government, seeks a continuance. Except for good cause, a continuance on motion of the person shall not exceed 5 days, and a continuance on motion of the attorney for the government shall not exceed 3 days. During a continuance, the person shall be detained, and the judicial officer, on motion of the attorney for the government or *sua sponte*, may order that, while in custody, a person who appears to be an addict receive a medical examination to determine whether the person is an addict, as defined in § 23-1331.

(2) At the hearing, the person has the right to be represented by counsel and, if financially unable to obtain adequate representation, to have counsel appointed.

(3) The person shall be afforded an opportunity to testify. Testimony of the person given during the hearing shall not be admissible on the issue of guilt in any other judicial proceeding, but the testimony shall be admissible in proceedings under §§ 23-1327, 23-1328, and 23-1329, in perjury proceedings, and for the purpose of impeachment in any subsequent proceedings.

(4) The person shall be afforded an opportunity to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing.

(5) The person shall be detained pending completion of the hearing.

(6) The hearing may be reopened at any time before trial if the judicial officer finds that information exists that was not known to the movant at the

time of the hearing and that has a material bearing on the issue of whether there are conditions of release that will reasonably assure the appearance of the person as required or the safety of any other person or the community.

(7) When a person has been released pursuant to this section and it subsequently appears that the person may be subject to pretrial detention, the attorney for the government may initiate a pretrial detention hearing by ex parte written motion. Upon such motion, the judicial officer may issue a warrant for the arrest of the person and if the person is outside the District of Columbia, the person shall be brought before a judicial officer in the district where the person is arrested and shall then be transferred to the District of Columbia for proceedings in accordance with this section.

(e) The judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account information available concerning:

(1) The nature and circumstances of the offense charged, including whether the offense is a crime of violence or dangerous crime as these terms are defined in § 23-1331, or involves obstruction of justice as defined in § 22-722;

(2) The weight of the evidence against the person;

(3) The history and characteristics of the person, including:

(A) The person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) Whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under local, state, or federal law; and

(4) The nature and seriousness of the danger to any person or the community that would be posed by the person's release.

(f) In a release order issued under § 23-1321(b) or (c), the judicial officer shall:

(1) Include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

(2) Advise the person of:

(A) The penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(B) The consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

(C) The provisions of § 22-722, relating to threats, force, or intimidation of witnesses, jurors, and officers of the court, obstruction of criminal investigations and retaliating against a witness, victim, or an informant.

(g) In a detention order issued under subsection (b) of this section, the judicial officer shall:

(1) Include written findings of fact and a written statement of the reasons for the detention;

(2) Direct that the person be committed to the custody of the Attorney General of the United States for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

(3) Direct that the person be afforded reasonable opportunity for private consultation with counsel; and

(4) Direct that, on order of a judicial officer or on request of an attorney for the government, the person in charge of the corrections facility in which the person is confined deliver the person to the United States Marshal or other appropriate person for the purpose of an appearance in connection with a court proceeding.

(h) The case of the person detained pursuant to subsection (b) of this section shall be placed on an expedited calendar and, consistent with the sound administration of justice, the person shall be indicted before the expiration of 90 days, and shall have trial of the case commence before the expiration of 100 days. However, the person may be detained for an additional period not to exceed 20 days from the date of the expiration of the 100-day period on the basis of a petition submitted by the attorney for the government and approved by the judicial officer. The additional period of detention may be granted only on the basis of good cause shown and shall be granted only for the additional time required to prepare for the expedited trial of the person. For the purposes of determining the maximum period of detention under this section, the period shall not exceed 120 days. The period shall:

(1) Begin on the date defendant is first detained after arrest; and

(2) Include the days detained pending a detention hearing and the days in confinement on temporary detention under subsection (a) of this section whether or not continuous with full pretrial detention. The defendant shall be treated in accordance with § 23-1321(a) unless the trial is in progress, has been delayed by the timely filing of motions excluding motions for continuance, or has been delayed at the request of the defendant.

(i) Nothing in this section shall be construed as modifying or limiting the presumption of innocence. (July 29, 1970, 84 Stat. 644, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1322; Sept. 17, 1982, D.C. Law 4-152, § 3, 29 DCR 3479; July 28, 1989, D.C. Law 8-19, § 2(a), 36 DCR 2844; May 8, 1990, D.C. Law 8-120, § 2(a), 37 DCR 24; July 3, 1992, D.C. Law 9-125, § 3, 39 DCR 2134; Aug. 20, 1994, D.C. Law 10-151, § 602(a), 41 DCR 2608; May 16, 1995, D.C. Law 10-255, § 17, 41 DCR 5193; July 25, 1995, D.C. Law 11-30, § 6, 42 DCR 1547.)

Section references. — This section is referred to in §§ 23-1321, 23-1323, 23-1324, and 23-1329.

Effect of amendments. — D.C. Law 10-151 added (b)(1)(D).

D.C. Law 10-255 substituted “no condition” for “no conditions” in the introductory language in (c); and substituted “§ 23-1321(b) or (c)” for “§ 1321(b) or (c)” in the introductory language in (f).

D.C. Law 11-30, in (e)(1), substituted “§ 22-

722;” for “section 502 of the District of Columbia Theft and White Collar Crimes Act of 1982, effective December 1, 1982 (D.C. Law 4-164; D.C. Code § 22-722).”; and validated a previously made change in the introductory language of (f).

Emergency act amendments. — For temporary amendment of section, see § 602 of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 4-152. — See note to § 23-1321.

Legislative history of Law 8-19. — Law 8-19, the “Law Enforcement Temporary Amendment Act of 1989,” was introduced in Council and assigned Bill No. 8-184, which was retained by Council. The Bill was adopted on first and second readings on March 7, 1989 and April 4, 1989, respectively. Signed by the Mayor on April 17, 1989, it was assigned Act No. 8-22 and transmitted to both Houses of Congress for its review.

Legislative history of Law 8-120. — Law 8-120, the “Law Enforcement Amendment Act of 1989,” was introduced in Council and assigned Bill No. 8-185, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on December 5, 1989, and December 19, 1989, respectively. Signed by the Mayor on December 21, 1989, it was assigned Act No. 8-129 and transmitted to both Houses of Congress for its review.

Legislative history of Law 9-125. — See note to § 23-1321.

Legislative history of Law 10-151. — See note to § 23-1321.

Legislative history of Law 10-255. — Law 10-255, the “Technical Amendments Act of 1994,” was introduced in Council and assigned Bill No. 10-673, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on June 21, 1994, and July 5, 1994, respectively. Signed by the Mayor on July 25, 1994, it was assigned Act No. 10-302 and transmitted to both Houses of Congress for its review. D.C. Law 10-255 became effective May 16, 1995.

Legislative history of Law 11-30. — Law 11-30, the “Technical Amendments Act of 1995,” was introduced in Council and assigned Bill No. 11-58, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on February 7, 1995 and March 7, 1995, respectively. Signed by the Mayor on March 22, 1995, it was assigned Act No. 11-32 and transmitted to both Houses of Congress for its review. D.C. Law 11-30 became effective on July 25, 1995.

Editor's notes. — The bracketed material was inserted in (e)(1) to correct an error in D.C. Law 9-125.

D.C. Law Review. — For symposium, “The Unnecessary Detention of Children in the District of Columbia — Clear and convincing evidence: The standard required to support pretrial detention of juveniles pursuant to D.C. Code § 16-2310”, see 3 D.C. L. Rev. 213 (1995).

For symposium, “The unnecessary detention of children in the District of Columbia — Juvenile detention law in the District of Columbia: A practitioner's guide”, see 3 D.C. L. Rev. 281 (1995).

Section is exclusive source of court's power to order pretrial detention. *Hazel v. United States*, App. D.C., 483 A.2d 1157 (1984).

Constitutionality of section. — This section provided a procedure for detention hearings which satisfied the requirements of fundamental fairness and did not deprive a defendant of due process. *Blunt v. United States*, App. D.C., 322 A.2d 579 (1974), superseded, in part, by statute, see, *Best v. United States*, App. D.C., 651 A.2d 790 (1994).

This section was not unconstitutional as denying due process by abridging presumption of innocence. *Blunt v. United States*, App. D.C., 322 A.2d 579 (1974), superseded, in part, by statute, see, *Best v. United States*, App. D.C., 651 A.2d 790 (1994).

This section did not unconstitutionally deny defendant due process of law by establishing clear and convincing evidence as standard of proof in detention hearings rather than the reasonable doubt standard. *Blunt v. United States*, App. D.C., 322 A.2d 579 (1974), superseded, in part, by statute, see, *Best v. United States*, App. D.C., 651 A.2d 790 (1994).

This section does not violate substantive due process as there is a compelling state interest in the pretrial detention of the narrow class of persons covered by its provisions. *United States v. Edwards*, App. D.C., 430 A.2d 1321 (1981), cert. denied, 455 U.S. 1022, 102 S. Ct. 1721, 72 L. Ed. 2d 141 (1982).

This section's procedures satisfy the minimum demands of procedural due process required before a person may be detained pending trial on the grounds of dangerousness to the community. *United States v. Edwards*, App. D.C., 430 A.2d 1321 (1981), cert. denied, 455 U.S. 1022, 102 S. Ct. 1721, 72 L. Ed. 2d 141 (1982).

The 100-day restriction on pretrial detention does not protect a defendant's right to a speedy trial pursuant to the Sixth Amendment; rather, it vindicates his Eighth Amendment right to bail. *Mack v. United States*, App. D.C., 637 A.2d 430 (1994).

Doctrine of constitutional overbreadth has no application to pretrial detention statute as it applies only to conduct which is constitutionally regulable, i.e., the detainee must be charged with the commission of a dangerous crime, or a crime of violence which a judicial officer finds with substantial probability was committed by the accused. *United States v. Edwards*, App. D.C., 430 A.2d 1321 (1981), cert. denied, 455 U.S. 1022, 102 S. Ct. 1721, 72 L. Ed. 2d 141 (1982).

Excessive bail clause of Eighth Amendment does not guarantee right to bail in criminal case. *United States v. Edwards*, App. D.C., 430 A.2d 1321 (1981), cert. denied, 455 U.S. 1022, 102 S. Ct. 1721, 72 L. Ed. 2d 141 (1982).

The Bail Reform Emergency Amendment Act of 1992 is applied retroactively. *United States v. Moore*, 120 WLR 1461 (Super. Ct. 1992).

The running of the 100-day time for trial requirement of the Emergency Act for preventive detention is tolled when surety bond is set, even if defendant cannot make bond. *United States v. Boyd*, 120 WLR 1473 (Super. Ct. 1992).

It is only when the government subsequently requests that a defendant be preventively detained that the running of the 100-day time limit continues or starts to run again if the preventive detention request is made at some point after the defendant's first court appearance. *United States v. Boyd*, 120 WLR 1473 (Super. Ct. 1992).

Council's authority to enact emergency criminal legislation. — Because the first emergency act expired before completion of prosecution of defendant, without any authority to sustain the ongoing prosecution, the prosecution of the defendant on challenged counts of the indictment is abated. *United States v. Alston*, No. 89 Crim. 4542 (Super. Ct. 1990), appeal docketed Nos. 90-167 and 90-168 (D.C., March 30, 1990).

Continuation of emergency conditions does not justify enactment of second or successive acts. The second emergency act amending District of Columbia criminal legislation is invalid. *United States v. Anderson*, 118 WLR 491 (Super. Ct. 1990).

Under § 49-301, the general savings provision in 1 U.S.C. § 109 applies in the District of Columbia and prevents the abatement of prosecutions begun, but not completed, before the expiration of emergency criminal legislation. *United States v. Jones*, No. 89-4106 (Super. Ct. 1990).

Purpose of pretrial detention. — Pretrial detention to prevent repetition of dangerous acts under subsection (a)(1) of this section by incapacitating the detainee seeks to curtail reasonably predictable conduct, not to punish for prior acts. *United States v. Edwards*, App. D.C., 430 A.2d 1321 (1981), cert. denied, 455 U.S. 1022, 102 S. Ct. 1721, 72 L. Ed. 2d 141 (1982).

Pretrial detention was not intended to promote either of the traditional aims of punishment, retribution and deterrence, nor does it seek to rehabilitate the detainee. *United States v. Edwards*, App. D.C., 430 A.2d 1321 (1981), cert. denied, 455 U.S. 1022, 102 S. Ct. 1721, 72 L. Ed. 2d 141 (1982).

Standard of substantial probability. — The legislative history of this section indicates that the standard of substantial probability, which is a higher standard than probable cause, was intended to be equivalent to the standard required to secure a civil injunction,

i.e., likelihood of success on the merits. *United States v. Edwards*, App. D.C., 430 A.2d 1321 (1981), cert. denied, 455 U.S. 1022, 102 S. Ct. 1721, 72 L. Ed. 2d 141 (1982).

No standing for constitutional challenge without allegation of injury in fact. — Plaintiffs consisting of individual trustees of Public Defender Service of District of Columbia, Washington Urban League Incorporated, and American Civil Liberties Union Fund of the National Capital Area had no standing to challenge constitutionality of the District of Columbia Court Reform and Criminal Procedure Act of 1970, where allegations failed to set out any "injury in fact" to the plaintiffs. *Dash v. Mitchell*, 356 F. Supp. 1292 (D.D.C.), aff'd sub nom. *Briscoe v. Kleindienst*, 409 U.S. 808, 93 S. Ct. 164, 34 L. Ed. 2d 70 (1972).

Nor based on status as federal taxpayers. — Plaintiffs had no standing as federal taxpayers to challenge the constitutionality of the District of Columbia Court Reform and Criminal Procedure Act of 1970 on theory that the plaintiffs' tax payments and those of other taxpayers would be used to defray the costs of pretrial detention of persons pursuant to the Act, since the Act serves primarily to regulate 1 aspect of the administration of criminal justice within the District of Columbia, and any expenditure of funds in the administration of the preventive division was only incidental in character. *Dash v. Mitchell*, 356 F. Supp. 1292 (D.D.C.), aff'd sub nom. *Briscoe v. Kleindienst*, 409 U.S. 808, 93 S. Ct. 164, 34 L. Ed. 2d 70 (1972).

Nor upon status as District of Columbia taxpayers. — Plaintiffs had no standing as District of Columbia taxpayers to challenge the constitutionality of the District of Columbia Court Reform and Criminal Procedure Act on the theory that plaintiffs' tax payments and those of other taxpayers of District would be used to defray the costs of pretrial detention of persons pursuant to the Act, since the preventive detention provisions were not part of a spending program but served primarily to regulate 1 aspect of administration of criminal justice within the District. *Dash v. Mitchell*, 356 F. Supp. 1292 (D.D.C.), aff'd sub nom. *Briscoe v. Kleindienst*, 409 U.S. 808, 93 S. Ct. 164, 34 L. Ed. 2d 70 (1972).

Nor based upon allegation that detention will follow another offense. — A complaint alleging that the plaintiff "is subject to pretrial detention if charged with another such offense" did not state a justiciable case or controversy so as to give standing to challenge constitutionality of the District of Columbia Court Reform and Criminal Procedure Act, where, there were no allegations of the possibility of another arrest for a "crime of violence," and there was no allegation that the plaintiff was inhibited or deterred in exercise of his First

Amendment rights. *Dash v. Mitchell*, 356 F. Supp. 1292 (D.D.C.), *aff'd sub nom. Briscoe v. Kleindienst*, 409 U.S. 808, 93 S. Ct. 164, 34 L. Ed. 2d 70 (1972).

Money bond may not be used to assure detention. *Villines v. United States*, App. D.C., 312 A.2d 304 (1973), *aff'd*, App. D.C., 320 A.2d 313 (1974).

Limited detention permissible. — Ordered pretrial detention is permissible under this section, limited to a very specific category of persons deemed dangerous. *Ireland v. United States*, App. D.C., 406 A.2d 1259 (1979).

When detention impermissible. — The Superior Court, in the absence of an application by the government for good cause shown, and where no statutory exception applies, may not detain a defendant beyond the time allowed by the Act. Under those circumstances a defendant may not be detained without conditions of release beyond 100 days. *Best v. United States*, App. D.C., 651 A.2d 790 (1994).

Because the government filed no formal application for an extension for good cause shown, its position at trial did not represent a request for extension of appellant's pretrial detention under subsection (h) of this section. *Best v. United States*, App. D.C., 651 A.2d 790 (1994).

Constitutional standard that must be satisfied before pretrial detention is permitted is the same as that for arrest — probable cause to believe that the suspect has committed a crime. *Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978).

Due process denied where detainee not advised of probation revocation proceeding. — Due process rights of defendant, who was arrested for robbery and was at that time on conditional probation following a conviction of sodomy, were violated where at his presentment he was ordered held without bail pursuant to subsection (e) of this section but the record failed to show that he was apprised of when a probation revocation hearing would take place or of the specific grounds on which the government intended to seek revocation. *Colter v. United States*, App. D.C., 392 A.2d 994 (1978).

Pretrial detention must not violate detainee's right to bail. *Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978).

But right to bail does not prevent protection of witnesses. — The court is not prevented by defendant's right to bail from acting to protect witnesses from threats by defendant. *Blunt v. United States*, App. D.C., 322 A.2d 579 (1974), superseded, in part, by statute, see, *Best v. United States*, App. D.C., 651 A.2d 790 (1994).

Opportunity to move for pretrial detention. — This section does not require that the government make a motion for pretrial detention as soon as grounds therefor become appar-

ent or be thereafter foreclosed from making such motion. *Blunt v. United States*, App. D.C., 322 A.2d 579 (1974), superseded, in part, by statute, see, *Best v. United States*, App. D.C., 651 A.2d 790 (1994).

Effect of unreasonable delay. — Dismissal of charges is inappropriate since subsection (h) of this section is part of a remedial preventive detention regime, and the proper remedy for non-compliance with the protections included in the statutory scheme is to reconsider the defendant's detention without bond, not to terminate the prosecution. *Mack v. United States*, App. D.C., 637 A.2d 430 (1994).

Effect of classification under subsection (a) of this section. — A finding by the trial judge that the defendant was a person described in subsection (a) of this section was sufficient to permit the Court of Appeals to determine that the court had found allegations that the defendant threatened government witnesses to be true by clear and convincing evidence. *Blunt v. United States*, App. D.C., 322 A.2d 579 (1974), superseded, in part, by statute, see, *Best v. United States*, App. D.C., 651 A.2d 790 (1994).

Failure to rebut allegations of threats. — Where, although the government's proffer of proof that the defendant had made threats against prospective witnesses was technically made before the government made its motion for pretrial detention, defendant and his counsel were present at time of proffer but made no effort to rebut it and both failed to ask court for additional time to gather evidence to rebut allegation of threats or took advantage of actual offer of court for such time, any error made by court in relying on government's proffer did not prejudice defendant and was harmless. *Blunt v. United States*, App. D.C., 322 A.2d 579 (1974), superseded, in part, by statute, see, *Best v. United States*, App. D.C., 651 A.2d 790 (1994).

Standard for measuring constitutional-ity of conditions of pretrial confinement. — Absent a violation of specific constitutional guarantees, the constitutionality of the conditions of pretrial confinement can be measured only by balancing the liberty interests of the pretrial detainee against the need of the state to protect the safety of the community. *Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978).

Pretrial detainees generally retain more rights than convicted prisoners. *Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978).

Particular entitlements judicially ordered. — Appellate court approved orders of federal district court ensuring that pretrial detainees at the District of Columbia jail would be provided a minimum space of their own, a regular change of linen and outer clothing, daily recreation, prompt psychiatric care, care-

fully regulated use of restraints and a rational security classification to prevent excessively harsh confinement and possibly to prepare the way for contact visits. *Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978).

Defendants are constitutionally entitled to demand proof by clear and convincing evidence that they are so dangerous that no combination of conditions of release will serve to adequately protect the community and that they must be deprived of their liberty before their trial by jury. *United States v. Cooper*, 115 WLR 1741 (Super. Ct. 1987).

Hearsay evidence may be presented under this section, although the court may require direct testimony if dissatisfied with a proffer. *United States v. Edwards*, App. D.C., 430 A.2d 1321 (1981), cert. denied, 455 U.S. 1022, 102 S. Ct. 1721, 72 L. Ed. 2d 141 (1982).

Preliminary proffer requirement is reasonable limitation on accused's right to call witnesses. — The requirement of a preliminary proffer, regarding the manner in which a witness' testimony will tend to negate substantial probability that the accused committed the charged offense, is a reasonable limitation on the accused's right to call witnesses in his favor. *United States v. Edwards*, App. D.C., 430 A.2d 1321 (1981), cert. denied, 455 U.S. 1022, 102 S. Ct. 1721, 72 L. Ed. 2d 141 (1982).

Cross-examination for credibility impeachment is insufficient reason to compel presence. — Since the government may proceed by proffer or hearsay at a pretrial detention hearing, cross-examination for the limited purpose of impeaching the witness' credibility is an insufficient reason to compel a witness' presence. *United States v. Edwards*, App. D.C., 430 A.2d 1321 (1981), cert. denied, 455 U.S. 1022, 102 S. Ct. 1721, 72 L. Ed. 2d 141 (1982).

Error to order closure of pretrial detention proceeding where criteria for closure unmet. — Absent findings of fact based upon a showing clearly demonstrating that pretrial publicity will jeopardize the party's right to a fair trial and that no alternative means are available to accord a fair trial without threatening the substantial public interest in open proceedings, it is error to order closure of a pretrial detention proceeding. *United States v. Edwards*, App. D.C., 430 A.2d 1321 (1981), cert. denied, 455 U.S. 1022, 102 S. Ct. 1721, 72 L. Ed. 2d 141 (1982).

Delay in trial caused by pretrial motions. — Preventively detained defendants are not entitled to the modification of their detention status if the start of their trial is delayed because the court must resolve timely filed pretrial motions. *United States v. Turner*, 121 WLR 105 (Super. Ct. 1992).

Defendant who waived his right to have his

trial commence within 100 days when his attorney was granted a continuance because of his heavy caseload, and who then accepted the government's plea offer and entered a guilty plea but before being sentenced, was allowed to withdraw his guilty plea, which started a new 100-day period. *United States v. Alexander*, 122 WLR 969 (Super. Ct. 1994).

Preindictment time not chargeable to state. — The legislature has deemed 9 months the outer limit for the government to investigate and decide whether it has sufficient evidence to request that a grand jury indict a case; the government should not be penalized for using this period of time to investigate a case adequately and properly by having some of this time charged against it in establishing a speedy trial violation. *United States v. Montgomery*, 123 WLR 1665 (Super. Ct. 1995).

Evidence sufficient to support denial of pretrial release. — A showing of the defendant's criminal record spanning 22 years, highly assaultive nature of his past offenses and gravity of the pending charge of assault with deadly weapon, together with failure of the defense to present any suitable structured program of release, supported a finding that no condition or combination of conditions of release would reasonably assure witness' safety and that the defendant should therefore be committed to pretrial detention. *Blunt v. United States*, App. D.C., 322 A.2d 579 (1974), superseded, in part, by statute, see, *Best v. United States*, App. D.C., 651 A.2d 790 (1994).

Resolution of motion tolled 100-day period. — Administering an oath to a witness to resolve a motion filed by the defendant tolls the running of the statutory 100-day requirement of subsection (h) of this section. *United States v. Turner*, 121 WLR 105 (Super. Ct. 1992).

Swearing of first witness tolled 100-day period. — Under subdivision (h)(2) of this section, the swearing of the first witness and then having him state his name for the record was not an insignificant event, and had the legal effect of tolling the running of the statutory period, and could not be considered as a mere pretense to avoid the 100-day requirements of subsection (h) of this section. *United States v. Turner*, 121 WLR 105 (Super. Ct. 1992).

Addition of new charges, following initial detention, cannot toll maximum detention period. — Once a defendant has been ordered detained, the clock starts running, and with certain exceptions he must be either tried or granted conditions of release within a maximum of 90 days; the later addition of new charges, even though they may be very serious, cannot toll the maximum detention period or start it running again. *Hazel v. United States*, App. D.C., 483 A.2d 1157 (1984).

Remand where bail excessive. — Although an accused charged with grand larceny and released on a personal recognizance bond allegedly threatened a witness and was arrested on charge of obstructing justice, setting of a surety bond of \$5,000 is not justified on theory that, in view of the serious nature of the pending charges and the unemployment of the accused, the accused was unreliable and unlikely to abide by nonfinancial conditions of release. The case must be remanded for proceedings on issue of pretrial detention or appropriate conditions of release. *Jones v. United States*, App. D.C., 347 A.2d 399 (1975).

Pretrial order for rejection of custodial release affirmed. — A pretrial order setting \$10,000 bail for the release of an accused, who was charged with robbery and weapon assault in a case of considerable notoriety and who exhibited self-oriented pattern of life with little or no recognition of social responsibility, and

rejecting the accused's plan to be placed in multiparty, 24-hour custody of his father, mother and grandmother would be affirmed. *Marshall v. United States*, App. D.C., 308 A.2d 766 (1973).

Cited in *In re A.W.*, App. D.C., 353 A.2d 686 (1976); *Pierce v. United States*, App. D.C., 402 A.2d 1237 (1979); *United States v. Brown*, 111 WLR 2101 (Super. Ct. 1983); *Fitzgerald v. United States*, App. D.C., 472 A.2d 52 (1984); *Anderson v. Sorrell*, App. D.C., 481 A.2d 766 (1984); *Akins v. District of Columbia*, App. D.C., 526 A.2d 933, cert. denied, 484 U.S. 890, 108 S. Ct. 213, 98 L. Ed. 2d 177 (1987); *United States v. Morgan*, 116 WLR 641 (Super. Ct. 1988); *Lynch v. United States*, App. D.C., 557 A.2d 580 (1989); *In re W.L.*, App. D.C., 603 A.2d 839 (1991); *McClain v. United States*, App. D.C., 601 A.2d 80 (1992); *Beckham v. United States*, App. D.C., 609 A.2d 1122 (1992); *Martin v. United States*, App. D.C., 614 A.2d 51 (1992).

§ 23-1323. Detention of addict.

(a) Whenever it appears that a person charged with a crime of violence, as defined in section 23-1331(4), may be an addict, as defined in section 23-1331 (5), the judicial officer may, upon motion of the United States attorney, order such person detained in custody for a period not to exceed three calendar days, under medical supervision, to determine whether the person is an addict.

(b) Upon or before the expiration of three calendar days, the person shall be brought before a judicial officer and the results of the determination shall be presented to such judicial officer. The judicial officer thereupon (1) shall treat the person in accordance with section 23-1321, or (2) upon motion of the United States attorney, may (A) hold a hearing pursuant to section 23-1322, or (B) hold a hearing pursuant to subsection (c) of this section.

(c) A person who is an addict may be ordered detained in custody under medical supervision if the judicial officer —

(1) holds a pretrial detention hearing in accordance with § 23-1322(d);

(2) finds that —

(A) there is clear and convincing evidence that the person is an addict;

(B) based on the factors set out in § 23-1322(e), there is no condition or combination of conditions of release which will reasonably assure the safety of any other person or the community; and

(C) on the basis of information presented to the judicial officer by proffer or otherwise, there is a substantial probability that the person committed the offense for which he is present before the judicial officer; and

(3) issues an order of detention accompanied by written findings of fact and the reasons for its entry.

(d) The provisions of § 23-1322(h) shall apply to this section. (July 29, 1970, 84 Stat. 646, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1323; July 3, 1992, D.C. Law 9-125, § 4, 39 DCR 2134.)

Section references. — This section is referred to in § 23-1324.

Legislative history of Law 9-125. — See note to § 23-1321.

This section is limited to situations where danger is contemplated. *Ireland v. United States*, App. D.C., 406 A.2d 1259 (1979).

Anticipated flight. — This section does not contemplate an order of detention because of anticipated flight. *Ireland v. United States*, App. D.C., 406 A.2d 1259 (1979).

Cited in *Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978).

§ 23-1324. Appeal from conditions of release.

(a) A person who is detained, or whose release on a condition requiring him to return to custody after specified hours is continued, after review of his application pursuant to § 23-1321(c)(4) by a judicial officer, other than a judge of the court having original jurisdiction over the offense with which he is charged or a judge of a United States court of appeals or a Justice of the Supreme Court, may move the court having original jurisdiction over the offense with which he is charged to amend the order. Such motion shall be determined promptly.

(b) In any case in which a person is detained after (1) a court denies a motion under subsection (a) to amend an order imposing conditions of release, (2) conditions of release have been imposed or amended by a judge of the court having original jurisdiction over the offense charged, or (3) he is ordered detained or an order for his detention has been permitted to stand by a judge of the court having original jurisdiction over the offense charged, an appeal may be taken to the court having appellate jurisdiction over such court. Any order so appealed shall be affirmed if it is supported by the proceedings below. If the order is not so supported, the court may remand the case for a further hearing, or may, with or without additional evidence, order the person released pursuant to section 23-1321(a). The appeal shall be determined promptly.

(c) In any case in which a judicial officer other than a judge of the court having original jurisdiction over the offense with which a person is charged orders his release with or without setting terms or conditions of release, or denies a motion for the pretrial detention of a person, the United States attorney may move the court having original jurisdiction over the offense to amend or revoke the order. Such motion shall be considered promptly.

(d) In any case in which —

(1) a person is released, with or without the setting of terms or conditions of release, or a motion for the pretrial detention of a person is denied, by a judge of the court having original jurisdiction over the offense with which the person is charged, or

(2) a judge of a court having such original jurisdiction does not grant the motion of the United States attorney filed pursuant to subsection (c), the United States attorney may appeal to the court having appellate jurisdiction over such court. Any order so appealed shall be affirmed if it is supported by the proceedings below. If the order is not so supported, (A) the court may remand the case for a further hearing, (B) with or without additional evidence, change the terms or conditions of release, or (C) in cases in which the United States attorney requested pretrial detention pursuant to sections 23-1322 and 23-1323, order such detention. (July 29, 1970, 84 Stat. 647, Pub. L. 91-358, title

II, § 210(a); 1973 Ed., § 23-1324; July 3, 1992, D.C. Law 9-125, § 5, 39 DCR 2134.)

Section references. — This section is referred to in § 23-1325.

Legislative history of Law 9-125. — See note to § 23-1321.

Trial court judges empowered to modify or revoke pretrial bail. — While subsequent bail matters may be brought before the commissioners, the trial court judges possess authority to take action modifying or revoking pretrial bail. *Clotterbuck v. United States*, App. D.C., 459 A.2d 134 (1983).

Superior Court Criminal Rule 117 cannot divest this power. — Superior Court Criminal Rule 117, creating a system of hearing commissioners in the Superior Court, cannot divest judges of the Superior Court of their plenary power respecting bail. *Clotterbuck v. United States*, App. D.C., 459 A.2d 134 (1983).

Superior Court judge may modify conditions of release imposed by hearing commissioner. — A Superior Court judge does possess authority to modify conditions of release originally imposed by the commissioner. *Clotterbuck v. United States*, App. D.C., 459 A.2d 134 (1983).

Challenge to constitutionality of pretrial detention rendered moot after conviction on underlying charges, and defendant, therefore, cannot challenge the trial judge's authority to revoke his bond during trial on appeal of convictions. *Sherrod v. United States*, App. D.C., 478 A.2d 644 (1984).

Requiring full time employment as condition of release improper. — Defendant's appeal from a pretrial bail order which required him to obtain full time employment as condition to his continued release was improper as he was not under detention and as no extraordinary situation was presented. *Walls v. United States*, App. D.C., 364 A.2d 154 (1976).

Refusal to grant bail not improper. — Where, prior to the accused's conviction of second-degree burglary, he had been convicted of taking property without right, housebreaking, disorderly conduct and drunkenness, had been twice convicted of unlawful entry and petit larceny and had been arrested 4 times on charges of housebreaking, the trial court's inability to find that if released accused would not pose danger to community and its refusal to

grant bail pending appeal from second-degree burglary conviction were not improper. *Johnson v. United States*, App. D.C., 291 A.2d 697 (1972).

Scope of review. — The review function does not permit the court to make a different decision anew so long as support (a rational basis) exists for the bail order imposed. *Martin v. United States*, App. D.C., 614 A.2d 51 (1992).

Pretrial order for bail and rejection of custodial release affirmed. — A pretrial order setting \$10,000 bail for the release of an accused, who was charged with robbery and weapon assault in case of considerable notoriety and who exhibited self-oriented pattern of life with little or no recognition of social responsibility, and rejecting the accused's plan to be placed in multiparty, 24-hour custody of his father, mother and grandmother would be affirmed. *Marshall v. United States*, App. D.C., 308 A.2d 766 (1973).

Pretrial detention open to periodic review and modification. — Pretrial detention orders are regulatory, not punitive measures, which are open to periodic review and modification. *Kleinbart v. United States*, App. D.C., 604 A.2d 861 (1992).

Remand to supplement record. — Where trial court set secured money bonds of \$10,000 each for 2 defendants charged with murder during the perpetration of robbery, but the record did not contain full information concerning the nature and circumstances of the offense and why other conditions of release would not be suitable, proceedings on appeal after defendants' motions for review of bond had been overruled would be remanded for supplementation of record by complete statement by trial court on those matters or, if trial court deemed it appropriate, entry of new orders respecting pretrial bail. *Bouknight v. United States*, App. D.C., 305 A.2d 524 (1973).

Cited in *Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978); *Ireland v. United States*, App. D.C., 406 A.2d 1259 (1979); *United States v. Edwards*, App. D.C., 430 A.2d 1321 (1981), cert. denied, 455 U.S. 1022, 102 S. Ct. 1721, 72 L. Ed. 2d 141 (1982); *Lynch v. United States*, App. D.C., 557 A.2d 580 (1989); *McClain v. United States*, App. D.C., 601 A.2d 80 (1992).

§ 23-1325. Release in first degree murder and assault with intent to kill while armed cases or after conviction.

(a) A person who is charged with murder in the first degree or assault with intent to kill while armed shall be treated in accordance with the provisions of

section 23-1321 unless the judicial officer has reason to believe that no one or more conditions of release will reasonably assure that the person will not flee or pose a danger to any other person or to the community. If such a risk of flight or danger is believed to exist, the person may be ordered detained. In any pretrial detention hearing under the provisions of this section, if the judicial officer finds that there is a substantial probability that the person has committed murder in the first degree while armed with or having readily available a pistol, firearm, or imitation firearm, there shall be a rebuttable presumption that no condition or combination of conditions of release will reasonably assure the safety of any other person or the community.

(b) A person who has been convicted of an offense and is awaiting sentence shall be detained unless the judicial officer finds by clear and convincing evidence that he is not likely to flee or pose a danger to any other person or to the property of others. Upon such finding, the judicial officer shall treat the person in accordance with the provisions of section 23-1321.

(c) A person who has been convicted of an offense and sentenced to a term of confinement or imprisonment and has filed an appeal or a petition for a writ of certiorari shall be detained unless the judicial officer finds by clear and convincing evidence that (1) the person is not likely to flee or pose a danger to any other person or to the property of others, and (2) the appeal or petition for a writ of certiorari raises a substantial question of law or fact likely to result in a reversal or an order for new trial. Upon such findings, the judicial officer shall treat the person in accordance with the provisions of section 23-1321.

(d) The provisions of section 23-1324 shall apply to persons detained in accordance with this section, except that the finding of the judicial officer that the appeal or petition for writ of certiorari does not raise by clear and convincing evidence a substantial question of law or fact likely to result in a reversal or order for new trial shall receive de novo consideration in the court in which review is sought. (July 29, 1970, 84 Stat. 647, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1325; Sept. 17, 1982, D.C. Law 4-152, §§ 4, 5, 29 DCR 3479; July 28, 1989, D.C. Law 8-19, § 2(b), 36 DCR 2844; May 8, 1990, D.C. Law 8-120, § 2(b), 37 DCR 24; July 3, 1992, D.C. Law 9-125, § 6, 39 DCR 2134.)

Section references. — This section is referred to in § 23-1321.

Legislative history of Law 4-152. — See note to § 23-1321.

Legislative history of Law 8-19. — See note to § 23-1322.

Legislative history of Law 8-120. — See note to § 23-1322.

Legislative history of Law 9-125. — See note to § 23-1321.

There is no constitutional right to bail on appeal. *Johnson v. United States*, App. D.C., 291 A.2d 697 (1972).

Money bond may not be used to assure detention. *Villines v. United States*, App. D.C., 312 A.2d 304 (1973), *aff'd*, App. D.C., 320 A.2d 313 (1974).

Application of subsections (b) and (c). —

The postconviction bail provisions of this section apply to persons convicted of purely local offenses and do not operate to deny bail to those convicted in the District of Columbia under federal criminal statutes having nationwide application. *United States v. Thompson*, 452 F.2d 1333 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 998, 92 S. Ct. 1251, 31 L. Ed. 2d 467 (1972).

Subsection (c) does not authorize the release of sentenced defendants pending the resolution of collateral attacks on their convictions. Rather, it authorizes release while a defendant's case is pending appeal. *United States v. Flynn*, 122 WLR 1021 (Super. Ct. 1994).

Applicability of Bail Reform Act. — The Federal Bail Reform Act, rather than the District of Columbia Code bail provisions, is appli-

cable where a defendant, convicted in federal court of a District of Columbia Code offense, presents a motion for release pending appeal in federal courts of District of Columbia. *United States v. Brown*, 483 F.2d 1314 (D.C. Cir. 1973).

Applications for release of prisoners convicted in the District of Columbia under federal criminal statutes having nationwide application must be considered under the Bail Reform Act and not under the Court Reform and Criminal Procedure Act. *United States v. Stanley*, 469 F.2d 576 (D.C. Cir. 1972).

Finding that release on bail poses no danger. — The requirement that before granting bail pending an appeal, the trial court must find that release on bail will not pose a danger to other persons or to property of others is not unreasonable. *Johnson v. United States*, App. D.C., 291 A.2d 697 (1972).

Since defendant raised substantial issues on appeal he had a right to be released, assuming he could show that he was unlikely to leave the jurisdiction or pose danger to others. *United States v. Sarvis*, 523 F.2d 1177 (D.C. Cir. 1975).

Clear and convincing evidence of dangerousness required. — Where pretrial detention is sought pursuant to subsection (a), the government must prove dangerousness by clear and convincing evidence. *Lynch v. United States*, App. D.C., 557 A.2d 580 (1989).

Defendants are constitutionally entitled to demand proof by clear and convincing evidence that they are so dangerous that no combination of conditions of release will serve to adequately protect the community and that they must be deprived of their liberty before their trial by jury. *United States v. Cooper*, 115 WLR 1741 (Super. Ct. 1987).

Where there was probable cause to believe that defendant committed the offense of first degree murder while armed and the government established defendant's dangerousness by clear and convincing evidence, defendant could be detained without bond pending his trial. *United States v. Lyons*, 116 WLR 941 (Super. Ct. 1988).

Evidence was sufficient to support trial court's denial of release pending imposition of sentence, in a proceeding in which the trial judge concluded that he was not clearly convinced that the welfare of the defendant's young children might not be jeopardized by the release of the defendant, who was convicted of second-degree murder of her husband. *Ibn-Tamas v. United States*, App. D.C., 368 A.2d 520 (1977).

Bail refused. — Defendants who were convicted of second degree murder and carrying a deadly weapon and as to whom the trial judge was unable to find that they were not likely to flee or pose a danger would not be granted bail

pending appeal. *United States v. Smith*, 476 F.2d 884 (D.C. Cir. 1972).

Where, prior to the accused's conviction of second degree burglary, he had been convicted of taking property without right, housebreaking, disorderly conduct and drunkenness, had been twice convicted of unlawful entry and petit larceny and had been arrested 4 times on charges of housebreaking, the trial court's inability to find that if released accused would not pose danger to community and its refusal to grant bail pending appeal from second-degree burglary conviction were not improper. *Johnson v. United States*, App. D.C., 291 A.2d 697 (1972).

Failure to make necessary finding that release presented no danger. — In view of the defendant's character and past record of convictions, including inducing a female to engage in prostitution, compelling a female by threats and duress to live a life of prostitution, assault with a dangerous weapon, mayhem, and malicious disfigurement, an order setting post-conviction bail was unsupported respecting necessary finding as to non-dangerousness, and defendant should have been ordered detained pending appeal and should have remained in custody, not because he lacked means to make bail, but for reason that his release would present danger to community. *Villines v. United States*, App. D.C., 312 A.2d 304 (1973), *aff'd*, App. D.C., 320 A.2d 313 (1974).

Authority to affirm pretrial detention order sua sponte. — The Court of Appeals has authority to affirm a pretrial detention order sua sponte when ruling on a motion for summary reversal, but such a ruling is highly unusual and should be reserved for the clearest of situations. *Kleinbart v. United States*, App. D.C., 604 A.2d 861 (1992).

Remand for further findings on failure to meet statutory standards. — Where the district court's order denying bail pending appeal did no more than repeat statutory standards contained in this section and stated that defendant had failed to meet them, although the federal rules of appellate procedure clearly state that the district court was to give reasons for action taken if it refused release pending appeal, remand for further findings is necessary. *United States v. Thompson*, 452 F.2d 1333 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 998, 92 S. Ct. 1251, 31 L. Ed. 2d 467 (1972).

Indictment following release pursuant to § 23-102. — When a defendant entitled to or actually granted relief pursuant to § 23-102 is thereafter indicted, his liberty cannot be restricted to the extent authorized by subsection (a) of this section, unless, following a de novo hearing, the court finds that the defendant would either fail to appear at future court proceedings or could pose a danger to the com-

munity if released. *Price v. United States*, App. D.C., 476 A.2d 644 (1984).

Cited in *United States v. Jones*, 476 F.2d 883 (D.C. Cir. 1972); *Campbell v. McGruder*, 580 F.2d 521 (D.C. Cir. 1978); *White v. United States*, App. D.C., 425 A.2d 616 (1980); *United States v. Davidson*, 110 WLR 217 (Super. Ct. 1982); *United States v. Williams*, 110 WLR 1601 (Super. Ct. 1982); *United States v. Finley*, 113 WLR 1809 (Super. Ct. 1985); *Montague v. United States*, App. D.C., 522 A.2d 866 (1987); *United States v. Towles*, 116 WLR 501 (Super.

Ct. 1988); *United States v. Goldston*, 118 WLR 1013 (Super. Ct. 1990); *United States v. Hargrove*, 118 WLR 1493 (Super. Ct. 1990); *McClain v. United States*, App. D.C., 601 A.2d 80 (1992); *Martin v. United States*, App. D.C., 614 A.2d 51 (1992); *Speaks v. United States*, App. D.C., 617 A.2d 942 (1992); *United States v. Moore*, 120 WLR 1461 (Super. Ct. 1992); *Scott v. United States*, App. D.C., 633 A.2d 72 (1993); *United States v. Montgomery*, 123 WLR 1665 (Super. Ct. 1995); *In re K.E.W.*, 123 WLR 1769 (Super. Ct. 1995).

§ 23-1326. Release of material witnesses.

If it appears by affidavit that the testimony of a person is material in any criminal proceeding, and if it is shown that it may become impracticable to secure his presence by subpoena, a judicial officer shall impose conditions of release pursuant to section 23-1321. No material witness shall be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and further detention is not necessary to prevent a failure of justice. Release may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure. (July 29, 1970, 84 Stat. 648, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1326; Apr. 30, 1988, D.C. Law 7-104, § 7(h), 35 DCR 147.)

Legislative history of Law 7-104. — Law 7-104, the “Technical Amendments Act of 1987,” was introduced in Council and assigned Bill No. 7-346, which was referred to the Committee of the Whole. The Bill was adopted on first and second readings on November 24, 1987 and December 8, 1987, respectively. Signed by the

Mayor on December 22, 1987, it was assigned Act No. 7-124 and transmitted to both Houses of Congress for its review.

Cited in *Christian v. United States*, App. D.C., 394 A.2d 1 (1978), cert. denied, 442 U.S. 944, 99 S. Ct. 2889, 61 L. Ed. 2d 315 (1979).

§ 23-1327. Penalties for failure to appear.

(a) Whoever, having been released under this title prior to the commencement of his sentence, willfully fails to appear before any court or judicial officer as required, shall, subject to the provisions of the Federal Rules of Criminal Procedure, incur a forfeiture of any security which was given or pledged for his release, and, in addition, shall, (1) if he was released in connection with a charge of felony, or while awaiting sentence or pending appeal or certiorari prior to commencement of his sentence after conviction of any offense, be fined not more than \$5,000 and imprisoned not less than one year and not more than five years, (2) if he was released in connection with a charge of misdemeanor, be fined not more than the maximum provided for such misdemeanor and imprisoned for not less than ninety days and not more than 180 days, or (3) if he was released for appearance as a material witness, be fined not more than \$1,000 or imprisoned for not more than 180 days, or both.

(b) Any failure to appear after notice of the appearance date shall be prima facie evidence that such failure to appear is wilful. Whether the person was warned when released of the penalties for failure to appear shall be a factor in

determining whether such failure to appear was wilful, but the giving of such warning shall not be a prerequisite to conviction under this section.

(c) The trier of facts may convict under this section even if the defendant has not received actual notice of the appearance date if (1) reasonable efforts to notify the defendant have been made, and (2) the defendant, by his own actions, has frustrated the receipt of actual notice.

(d) Any term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment. (July 29, 1970, 84 Stat. 648, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1327; Aug. 20, 1994, D.C. Law 10-151, § 101(b), (c), 41 DCR 2608.)

Section references. — This section is referred to in §§ 23-1303 and 23-1322.

Effect of amendments. — D.C. Law 10-151 substituted "180 days" for "one year" in (a)(2) and (3).

Emergency act amendments. — For temporary amendment of section, see § 101(b) and (c) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — See note to § 23-1321.

Bail Reform Act is constitutionally sound. *Raymond v. United States*, App. D.C., 396 A.2d 975 (1979).

Phrase "released ... prior to the commencement of his sentence" in subsection (a) is intended to make certain that a defendant will be subject to the sanctions of the bail-jumping statute at all stages of a criminal proceeding until he surrenders to serve his sentence and is not intended to indicate that conviction and sentence in underlying offense are conditions precedent to bail-jumping conviction. *Williams v. United States*, App. D.C., 331 A.2d 341 (1975).

Method for punishing failure to appear. — Proper exercise of the court's contempt power, after appropriate factual inquiry, appears to be a prescribed method of punishing a defendant who fails to appear for trial. *Campbell v. United States*, App. D.C., 295 A.2d 498 (1972).

Elements of wilful failure to appear are release pending trial or sentencing; requirement to appear; failure to appear; and that failure being wilful. *Raymond v. United States*, App. D.C., 396 A.2d 975 (1979); *Trice v. United States*, App. D.C., 525 A.2d 176 (1987).

Intent required. — For conviction of wilful failure to appear while subject to conditions of release, the government must satisfy the burden of showing that the failure to appear is wilful by demonstrating the general intent of defendant to commit the act of omission, and no specific intent need be proved. *Patton v. United States*, App. D.C., 326 A.2d 818 (1974).

To establish wilfulness in a bail jumping

case, all that the government must prove is that the defendant's failure to appear in court when requested was knowing, intentional and deliberate rather than inadvertent or accidental. *Trice v. United States*, App. D.C., 525 A.2d 176 (1987).

Prima facie case. — If the government proves that factual circumstances imply that a defendant's actions were wilful, it rationally and constitutionally meets its burden to prove a prima facie case under this section. *Raymond v. United States*, App. D.C., 396 A.2d 975 (1979).

Government failed to make out a prima facie showing of a wilful failure to appear where there was no direct evidence that defendant was personally informed of where his case was to be called, or comparable circumstantial evidence, and where the notice-to-return form that defendant received did not, of itself, provide him with sufficiently accurate or complete notice of the location of the next scheduled proceeding to guide his efforts to reappear. *Smith v. United States*, App. D.C., 583 A.2d 975 (1990).

Permissible inference of wilfulness. — The Bail Reform Act does not shift the burden to defendant to disprove the presumed existence of the element of wilful failure to appear but it merely creates, for the trier of fact, a permissible inference of wilfulness based on a showing of notice and failure to appear. *Raymond v. United States*, App. D.C., 396 A.2d 975 (1979).

Although the wording of subsection (b) of this section may be read to imply that the inference of wilfulness is mandatory, it appears that in practice the trier of fact has merely been permitted, and not required, to infer wilfulness. *Raymond v. United States*, App. D.C., 396 A.2d 975 (1979).

The Bail Reform Act merely allows the government to prove defendant's state of mind by establishing circumstances from which the trier of fact may, but is not required to, reasonably infer the requisite state of mind. *Raymond v. United States*, App. D.C., 396 A.2d 975 (1979).

Defendant entitled to rebut inference of wilfulness. — In a criminal contempt case,

even if the trial court may draw an inference of wilfulness solely from a failure to appear after notice, this inference may not be converted to a conclusive presumption; the defendant must have an opportunity to rebut. If a defendant's testimony tends to rebut the inference of wilfulness, the trial court must address that testimony before holding the defendant in contempt; otherwise, the record will not reflect why the defendant's rebuttal was insufficient. *Williams v. United States*, App. D.C., 576 A.2d 1339 (1990).

Reliance on statutory presumption did not violate Fifth Amendment. — The trial court's reliance upon the statutory presumption to establish the element of wilfulness necessary to a conviction of bail jumping, did not violate the defendant's Fifth Amendment rights to due process and privilege against self-incrimination. *Robinson v. United States*, App. D.C., 322 A.2d 271 (1974).

Testimony bearing on wilfulness ruled hearsay. — Where at trial, defendant attempted to prove that his absence from court had not been "wilful" as required by this section, the trial court erred in ruling that defendant's proffered testimony as to what he was told by the clerk at the information center concerning the status of his case was "strictly hearsay." *Jenkins v. United States*, App. D.C., 415 A.2d 545 (1980).

Adequate notice. — Defendant's undisputed receipt of the form notifying him of the date he was due back in court at his arraignment was sufficient to establish that he had adequate notice, which in turn was prima facie evidence that his failure to appear was wilful under subsection (b). *Trice v. United States*, App. D.C., 525 A.2d 176 (1987).

Proof of timely notice. — Because wilfulness must be shown by evidence that the defendant's failure to appear was knowing, intentional and deliberate rather than inadvertent or accidental, it logically follows that the government must prove that the defendant received timely notice of where he was required to be. *Smith v. United States*, App. D.C., 583 A.2d 975 (1990).

Any sentence for failure to appear must be consecutive to any other sentence of imprisonment. *Davis v. United States*, App. D.C., 397 A.2d 951 (1979).

Court appointed attorney is under no duty to search for defendant in court building when defendant fails to appear in designated courtroom at appointed time. *United States v. Moss*, 438 F.2d 147 (D.C. Cir. 1970).

Failure to advise experienced defendant to appear at designated time. — Where the defendant was a 40-year-old man who had prior experience with police and with criminal arrests and who knew that he had to be in courtroom on particular day and what the con-

sequences of failure to appear would be, failure on part of defendant's court appointed attorney to advise the defendant to appear at the designated time is not ineffective representation of counsel. *United States v. Moss*, 438 F.2d 147 (D.C. Cir. 1970).

Effect of dismissal of underlying charge. — The fact that an underlying burglary charge was dismissed does not render invalid the defendant's conviction for wilfully failing to appear at a preliminary hearing on the burglary charge. *Williams v. United States*, App. D.C., 331 A.2d 341 (1975).

Dismissal of prosecution for violation of section. — The fact that a defendant has been convicted of criminal contempt and has served a jail sentence (for violating a condition of pretrial release by failing to appear as required) compels the subsequent dismissal of a prosecution charging a violation of this section filed 3 days prior to the contempt finding and based on the same conduct. *United States v. Jackson*, 113 WLR 2437 (Super. Ct.).

Hearing on motion to set aside bond forfeiture. — Given a proffer of data regarding asserted departures from the customary practice by the bail agency and the clerk's office, a bondsman's assistance in apprehending the defendant and the delay or prejudice suffered by the government by the breach, it was error for the trial judge not to have held an evidentiary hearing on motion of bondsman to set aside bond forfeiture. *United States v. Nell*, 515 F.2d 1351 (D.C. Cir. 1975).

Sentencing under this section and not the former Federal Youth Corrections Act, 18 U.S.C. §§ 5005-5026 (Repealed), was proper where, although the violation occurred while the F.Y.C.A. was still operative, the sentencing occurred after the F.Y.C.A. was repealed by the Comprehensive Crime Control Act, which removed the statutory authorization for F.Y.C.A. commitments. *Melson v. United States*, App. D.C., 505 A.2d 455 (1986).

Admissibility of evidence. — Evidence about the general practice of courtroom clerks when judges change courtrooms was properly admissible as relevant to the issue of whether appellant wilfully failed to appear; however, for such evidence to be probative, a foundation should have been established for the witness' basis of knowledge of the general practice, and because of the absence of such a foundation, the evidence was improperly admitted. *Smith v. United States*, App. D.C., 583 A.2d 975 (1990).

Insufficient evidence to support a conviction. — There was insufficient evidence to support a conviction for the defendant's failure to appear in court where the government did not show the defendant received timely notice of the room change for his case. *Bolan v. United States*, App. D.C., 587 A.2d 458 (1991).

Cited in *Choco v. United States*, App. D.C., 383 A.2d 333 (1978); *Reavis v. United States*, App. D.C., 395 A.2d 75 (1978); *Keith v. Washington*, App. D.C., 401 A.2d 468 (1979); *Grant v. United States*, App. D.C., 402 A.2d 405 (1979); *Burgos v. United States*, App. D.C., 404 A.2d 532 (1979); *Williams v. United States*, App. D.C., 408 A.2d 996 (1979); *Washington v. United States*, App. D.C., 434 A.2d 394 (1980); *Prince v. United States*, App. D.C., 432 A.2d 720 (1981); *Tolson v. United States*, App. D.C., 448 A.2d 248 (1982); *United States v. Williams*, 110 WLR 1601 (Super. Ct. 1982); *Chavarria v. United States*, App. D.C., 505 A.2d 59 (1986); *Jenkins v. United States*, App. D.C., 506 A.2d 1120, cert. denied, 479 U.S. 845, 107 S. Ct. 160, 93 L. Ed. 2d 99 (1986); *Craig v. United States*, App. D.C., 523 A.2d 567 (1987); *Resper v. United States*, App. D.C., 527 A.2d 1257 (1987);

Hill v. United States, App. D.C., 529 A.2d 788 (1987); *United States v. Wheeler*, 115 WLR 2025 (Super. Ct. 1987); *Green v. United States*, App. D.C., 544 A.2d 714 (1988); *Thomas v. United States*, App. D.C., 553 A.2d 1206 (1989); *White v. United States*, App. D.C., 564 A.2d 379 (1989); *United States v. Dixon*, 117 WLR 9 (Super. Ct. 1989); *Swisher v. United States*, App. D.C., 572 A.2d 85 (1990); *Kelly v. United States*, App. D.C., 590 A.2d 1031 (1991); *Goldsberry v. United States*, App. D.C., 598 A.2d 376 (1991); *Gray v. United States*, App. D.C., 600 A.2d 367 (1991); *Hunter v. United States*, App. D.C., 606 A.2d 139, cert. denied, 506 U.S. 991, 113 S. Ct. 509, 121 L. Ed. 2d 444 (1992); *Parks v. United States*, App. D.C., 627 A.2d 1 (1993); *United States v. Flynn*, 122 WLR 1021 (Super. Ct. 1994); *Ford v. United States*, App. D.C., 647 A.2d 1181 (1994).

§ 23-1328. Penalties for offenses committed during release.

(a) Any person convicted of an offense committed while released pursuant to section 23-1321 shall be subject to the following penalties in addition to any other applicable penalties:

(1) A term of imprisonment of not less than one year and not more than five years if convicted of committing a felony while so released; and

(2) A term of imprisonment of not less than ninety days and not more than 180 days if convicted of committing a misdemeanor while so released.

(b) The giving of a warning to the person when released of the penalties imposed by this section shall not be a prerequisite to the application of this section.

(c) Any term of imprisonment imposed pursuant to this section shall be consecutive to any other sentence of imprisonment. (July 29, 1970, 84 Stat. 649, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1328; Aug. 20, 1994, D.C. Law 10-151, § 101(d), 41 DCR 2608.)

Section references. — This section is referred to in §§ 23-1303, 23-1321 and 23-1322.

Effect of amendments. — D.C. Law 10-151 substituted “180 days” for “one year” in (a)(2).

Emergency act amendments. — For temporary amendment of section, see § 101(d) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 10-151. — See note to § 23-1321.

There is no constitutional impediment to legislative imposition of increased penalties for the commission and conviction of a crime as provided for in this section. *Daniel v. United States*, App. D.C., 408 A.2d 1231 (1979).

Section does not deny equal protection or due process. — In light of the circumstances that existed at the time of its enact-

ment, this section is a reasonable response to a legitimate governmental activity, and as such does not deny equal protection or due process guarantees. *Daniel v. United States*, App. D.C., 408 A.2d 1231 (1979).

Penalties under this section are not unconstitutional. — Penalties under this section flow, not from the mere fact of arrest, but from the affirmative act of engaging in an offense, resulting in conviction during post-arrest release, and are not unconstitutional. *Speight v. United States*, App. D.C., 569 A.2d 124 (1989).

This section does not create a new and separate crime. *Tansimore v. United States*, App. D.C., 355 A.2d 799 (1973).

Basis for imposition of increased sentence. — It is not the disposition of the earlier charge which triggers the enhanced penalty under this section in a second offense. Rather, it

is the commission of the second offense while on release, and the subsequent conviction for that offense, which activates imposition of an increased sentence. *Daniel v. United States*, App. D.C., 408 A.2d 1231 (1979).

This section imposes no sanction until and unless it is proven beyond a reasonable doubt that the person committed the second offense while on pretrial release. The enhanced penalty is imposed not for the release status as such, but rather for committing the second offense while on release. It is the commission of the second crime that is being punished. *Speight v. United States*, App. D.C., 569 A.2d 124 (1989).

Fact of pretrial release triggers enhancement provision. — Under this section no qualification is imposed that the person be guilty of the first offense or that the procedures leading to the pretrial release be free of constitutional imperfection. It is the fact of pretrial release that triggers the enhancement provision. *Speight v. United States*, App. D.C., 569 A.2d 124 (1989).

Error to sentence upon unsubstantiated allegations. — In the absence of an admission or proof that the defendant was on release when he committed offenses, it is error to sentence defendant as a release offender on basis of unsubstantiated allegations by the government. *Tansimore v. United States*, App. D.C., 355 A.2d 799 (1976).

Cited in *United States v. Lowery*, App. D.C., 382 A.2d 1007 (1977); *Harvey v. United States*, App. D.C., 395 A.2d 92 (1978), cert. denied, 441 U.S. 936, 99 S. Ct. 2061, 60 L. Ed. 2d 665 (1979); *Arnold v. United States*, App. D.C., 443 A.2d 1318 (1982); *United States v. Cureton*, 110 WLR 245 (Super. Ct. 1982); *United States v. Williams*, 110 WLR 1601 (Super. Ct. 1982); *Fields v. United States*, App. D.C., 547 A.2d 138 (1988); *United States v. Dixon*, 117 WLR 9 (Super. Ct. 1989); *Stratmon v. United States*, App. D.C., 631 A.2d 1177 (1993).

§ 23-1329. Penalties for violation of conditions of release.

(a) A person who has been conditionally released pursuant to section 23-1321 and who has violated a condition of release shall be subject to revocation of release, an order of detention, and prosecution for contempt of court.

(b) Proceedings for revocation of release may be initiated on motion of the United States Attorney. A warrant for the arrest of a person charged with violating a condition of release may be issued by a judicial officer and if such person is outside the District of Columbia he shall be brought before a judicial officer in the district where he is arrested and shall then be transferred to the District of Columbia for proceedings in accordance with this section. No order of revocation and detention shall be entered unless, after a hearing, the judicial officer finds that —

(1) there is clear and convincing evidence that such person has violated a condition of his release; and

(2) based on the factors set out in § 23-1322(e), there is no condition or combination of conditions of release which will reasonably assure that such person will not flee or pose a danger to any other person or the community. The provisions of § 23-1322(d) and (h) shall apply to this subsection.

(c) Contempt sanctions may be imposed if, upon a hearing and in accordance with principles applicable to proceedings for criminal contempt, it is established that such person has intentionally violated a condition of his release. Such contempt proceedings shall be expedited and heard by the court without a jury. Any person found guilty of criminal contempt for violation of a condition of release shall be imprisoned for not more than six months, or fined not more than \$1,000, or both.

(d) Any warrant issued by a judge of the Superior Court for violation of release conditions or for contempt of court, for failure to appear as required, or

pursuant to § 23-1322(d)(7), may be executed at any place within the jurisdiction of the United States. Such warrants shall be executed by a United States marshal or by any other officer authorized by law. (July 29, 1970, 84 Stat. 649, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1329; July 3, 1992, D.C. Law 9-125, § 7, 39 DCR 2134.)

Section references. — This section is referred to in §§ 23-1303 and 23-1322.

Legislative history of Law 9-125. — See note to § 23-1321.

In order to convict an individual for criminal contempt, it is necessary to find beyond a reasonable doubt that the individual committed a volitional act that constitutes contempt. *Parker v. United States*, App. D.C., 373 A.2d 906 (1977).

Conviction of contempt cannot be predicated solely on defendant's being arrested on probable cause, since the volitional act would be commission of a crime, not the matter of being arrested. *Parker v. United States*, App. D.C., 373 A.2d 906 (1977).

Method for punishing failure to appear. — Proper exercise of the court's contempt power, after appropriate factual inquiry, appears to be a prescribed method of punishing a defendant who fails to appear for trial. *Campbell v. United States*, App. D.C., 295 A.2d 498 (1972).

Violation of right to confrontation held harmless. — A defendant, who conceded in open court that he had knowingly violated 2 conditions of his release on personal recognizance, in effect confessed to contemptuous conduct, and officers' statements in a report introduced at the hearing simply corroborated that confession, and thus violation of defendant's right to confront officers whose statements were contained in report was harmless beyond a reasonable doubt. In *re Wiggins*, App. D.C., 359 A.2d 579 (1976).

Admission of evidence did not cause self-incrimination. — Where the issue the defendant sought to raise at a criminal contempt hearing was the reason he had been in District of Columbia after curfew in violation of a condition of his release, and not whether he had been there, officers' statements in a bail agency report, which were admitted at such

hearing, concerning defendant's presence at that time and place cannot be deemed to have caused defendant to take stand and incriminate himself. In *re Wiggins*, App. D.C., 359 A.2d 579 (1976).

Section 11-944 operates independently of and in addition to subsection (c) of this section, so that the sentencing limit of 6-months' imprisonment and \$1,000 does not apply to convictions for violations of a pretrial release order constituting contempt under § 11-944. *Caldwell v. United States*, App. D.C., 595 A.2d 961 (1991).

The legislative history of this section does not reveal an intent by Congress to override the unlimited sentencing provision of § 11-944 in cases involving violations of conditions of pretrial release under § 23-1321. *Caldwell v. United States*, App. D.C., 595 A.2d 961 (1991).

Right to testify. — The Constitution's guarantee of due process confers upon defendants in criminal contempt proceedings under Superior Court Criminal Rule 42(b) an unqualified right to testify in their behalf, subject to normal rules of relevance and procedure. *Beckham v. United States*, App. D.C., 609 A.2d 1122 (1992).

Although the defendant uttered a few words at a hearing in response to questions by the court, this response was not the equivalent of the right to testify; it was not a substitute for the defendant's opportunity, under questioning by his advocate, to account for his activities at the relevant times in enough detail, and with enough evidence of sincerity, to have a chance of persuading the factfinder. *Beckham v. United States*, App. D.C., 609 A.2d 1122 (1992).

Cited in *Speight v. United States*, App. D.C., 569 A.2d 124 (1989); *United States v. Dixon*, 117 WLR 9 (Super. Ct. 1989); *Swisher v. United States*, App. D.C., 572 A.2d 85 (1990); *Cruz-Foster v. Foster*, App. D.C., 597 A.2d 927 (1991); *United States v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993).

§ 23-1330. Contempt.

Nothing in this subchapter shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt. (July 29, 1970, 84 Stat. 649, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1330.)

Cross references. — As to contempt power of Superior Court, see § 11-944.

Cited in *Caldwell v. United States*, App. D.C., 595 A.2d 961 (1991).

§ 23-1331. Definitions.

As used in this subchapter:

(1) The term “judicial officer” means, unless otherwise indicated, any person or court in the District of Columbia authorized pursuant to section 3041 of Title 18, United States Code, or the Federal Rules of Criminal Procedure, to bail or otherwise release a person before trial or sentencing or pending appeal in a court of the United States, and any judge of the Superior Court.

(2) The term “offense” means any criminal offense committed in the District of Columbia, other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress.

(3) The term “dangerous crime” means (A) taking or attempting to take property from another by force or threat of force, (B) unlawfully entering or attempting to enter any premises adapted for overnight accommodation of persons or for carrying on business with the intent to commit an offense therein, (C) arson or attempted arson of any premises adaptable for overnight accommodation of persons or for carrying on business, (D) first degree sexual abuse, or assault with intent to commit first degree sexual abuse, or (E) unlawful sale, distribution of or possession with intent to distribute a controlled substance, as “controlled substance” is defined in the District of Columbia Code or any Act of Congress, if the offense is punishable by imprisonment for more than 1 year.

(4) The term “crime of violence” means murder, first degree sexual abuse, child sexual abuse, mayhem, kidnapping, robbery, burglary, voluntary manslaughter, extortion or blackmail accompanied by threats of violence, arson, assault with intent to commit any offense, assault with a dangerous weapon, aggravated assault, armed carjacking, or an attempt or conspiracy to commit any of the foregoing offenses as defined by any Act of Congress or any State law, if the offense is punishable by imprisonment for more than one year.

(5) The term “addict” means any individual who habitually uses any narcotic drug as defined by section 4731 of the Internal Revenue Code of 1954 so as to endanger the public morals, health, safety, or welfare. (July 29, 1970, 84 Stat. 650, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1331; July 28, 1989, D.C. Law 8-19, § 2(c), 36 DCR 2844; May 8, 1990, D.C. Law 8-120, § 2(c), 37 DCR 24; May 8, 1993, D.C. Law 9-270, § 3, 39 DCR 9223; Oct. 2, 1993, D.C. Law 10-26, § 3, 40 DCR 3416; Aug. 20, 1994, D.C. Law 10-151, § 101(e), 41 DCR 2608; May 23, 1995, D.C. Law 10-257, § 401(f), 42 DCR 53.)

Section references. — This section is referred to in §§ 16-2310.1, 22-103, 23-1322, and 23-1323.

Effect of amendments. — D.C. Law 10-151 inserted “aggravated assault” in (4).

D.C. Law 10-257 rewrote (3)(D); and substituted “first degree sexual abuse, child sexual abuse” for “forcible rape, carnal knowledge of a female under the age of sixteen, taking or attempting to take immoral, improper, or indecent liberties with a child under the age of sixteen years” in (4).

Emergency act amendments. — For temporary amendment of section, see § 101(e) of the Omnibus Criminal Justice Reform Emergency Amendment Act of 1994 (D.C. Act 10-255, June 22, 1994, 41 DCR 4286).

Legislative history of Law 8-19. — See note to § 23-1322.

Legislative history of Law 8-120. — See note to § 23-1322.

Legislative history of Law 9-270. — Law 9-270, the “Carjacking Prevention Temporary Amendment Act of 1992,” was introduced in

Council and assigned Bill No. 9-629. The Bill was adopted on first and second readings on October 6, 1992, and November 4, 1992, respectively. Signed by the Mayor on November 25, 1992, it was assigned Act No. 9-328 and transmitted to both Houses for Congress for its review. D.C. Law 9-270 became effective on May 8, 1993.

Legislative history of Law 10-26. — Law 10-26, the “Carjacking Prevention Amendment Act of 1993,” was introduced in Council and assigned Bill No. 10-16, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on April 7, 1993, and May 4, 1993, respectively. Signed by the Mayor on May 19, 1993, it was assigned Act No. 10-28 and transmitted to both Houses of Congress for its review. D.C. Law 10-26 became effective on October 2, 1993.

Legislative history of Law 10-151. — See note to § 23-1321.

Legislative history of Law 10-257. — Law 10-257, the “Anti-Sexual Abuse Act of 1994,”

was introduced in Council and assigned Bill No. 10-87, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on November 1, 1994, and December 6, 1994, respectively. Signed by the Mayor on December 28, 1994, it was assigned Act No. 10-385 and transmitted to both Houses of Congress for its review. D.C. Law 10-257 became effective May 23, 1995.

References in text. — Section 4731 of the Internal Revenue Code of 1954, referred to in paragraph (5), was repealed by § 1101(b)(3)(A) of Pub. L. 91-513.

Cited in *United States v. Edwards*, App. D.C., 430 A.2d 1321 (1981), cert. denied, 455 U.S. 1022, 102 S. Ct. 1721, 72 L. Ed. 2d 141 (1982); *Fitzgerald v. United States*, App. D.C., 472 A.2d 52 (1984); *United States v. Cooper*, 115 WLR 1741 (Super. Ct. 1987); *United States v. Jackson*, 121 WLR 849 (Super. Ct. 1993); *United States v. Jackson*, 122 WLR 1 (Super. Ct. 1993).

§ 23-1332. Applicability of subchapter.

The provisions of this subchapter shall apply in the District of Columbia in lieu of the provisions of sections 3146 through 3152 of Title 18, United States Code. (July 29, 1970, 84 Stat. 650, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1332.)

Applicability of Bail Reform Act. — Applications for release of prisoners convicted in the District of Columbia under federal criminal statutes having nationwide application must be

considered under the Bail Reform Act and not under the Court Reform and Criminal Procedure Act. *United States v. Stanley*, 469 F.2d 576 (D.C. Cir. 1972).

§ 23-1333. Consideration of juvenile history.

A judicial officer shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required, and the safety of any other person and the community, take into account the person’s juvenile law enforcement and case records. (May 15, 1993, D.C. Law 9-272, § 107, 40 DCR 796.)

Legislative history of Law 9-272. — Law 9-272, the “Criminal and Juvenile Justice Reform Amendment Act of 1992,” was introduced in Council and assigned Bill No. 9-374, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second read-

ings on December 1, 1992, and December 15, 1992, respectively. Signed by the Mayor on January 14, 1993, it was assigned Act No. 9-401 and transmitted to both Houses of Congress for its review. D.C. Law 9-272 became effective on May 15, 1993.

CHAPTER 15. OUT-OF-STATE WITNESSES.

Sec.	Sec.
23-1501. Definitions.	of witnesses at criminal prosecutions in the District of Columbia; travel allowance; penalty.
23-1502. Hearing on recall of out-of-State witnesses by State courts; determination; travel allowance; penalty.	23-1504. Exemption from arrest.
23-1503. Certificate providing for attendance	

§ 23-1501. Definitions.

As used in this chapter —

(1) The term “witness” includes a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution, or proceeding.

(2) The term “State” includes the Commonwealth of Puerto Rico, the District of Columbia, the Virgin Islands, Guam, American Samoa, and any other territory or possession of the United States.

(3) The term “summons” includes a subpoena, order, or other notice requiring the appearance of a witness. (July 29, 1970, 84 Stat. 650, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1501.)

§ 23-1502. Hearing on recall of out-of-State witnesses by State courts; determination; travel allowance; penalty.

(a) If a judge of a court of record in any State which by its laws has made provision for commanding persons within that State to attend and testify in the District of Columbia certifies under the seal of the court (1) that there is a criminal prosecution pending in that court, or that a grand jury investigation has commenced or is about to commence, (2) that a person within the District of Columbia is a material witness in the prosecution or grand jury investigation, and (3) that his presence will be required for a specified number of days, upon presentation of that certificate to any judge of the Superior Court of the District of Columbia, except as provided in subsection (c), such judge shall fix a time and place for a hearing, and shall make an order directing the witness to appear at a time and place certain for the hearing.

(b) If at the hearing the judge determines that the witness is material and necessary, that it will not cause undue hardship to the witness to attend and testify in the prosecution or grand jury investigation in the requesting State, and that the laws of such State and of any other State through which the witness may be required to pass by ordinary course of travel, will give to him protection from arrest and the service of civil and criminal process, he shall issue a summons, with a copy of the certificate attached, directing the witness to attend and testify in the prosecution or grand jury investigation, as the case may be, at a time and place specified in the summons. In any such hearing the certificate shall be prima facie evidence of all the facts stated therein.

(c) If the certificate presented under subsection (a) recommends that the witness be taken into immediate custody and delivered to an officer of the

requesting State to assure his attendance, in the requesting State, the judge may in lieu of notification of hearing, direct that the witness be forthwith brought before him for a hearing. If the judge at the hearing is satisfied of the desirability of the custody and delivery of the witness, he may, in lieu of issuing subpoena or summons, order the witness to be forthwith taken into custody and delivered to an officer of the requesting State. The certificate shall be prima facie proof of the desirability of the custody and delivery of the witness.

(d) Any witness who is summoned as above provided and, after being paid or tendered by some properly authorized person the fees and allowances authorized for witnesses in criminal cases in United States district courts, fails without good cause to attend and testify as directed in the summons, shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from the Superior Court. (July 29, 1970, 84 Stat. 651, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1502.)

§ 23-1503. Certificate providing for attendance of witnesses at criminal prosecutions in the District of Columbia; travel allowance; penalty.

(a) If a person in any State, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions or grand jury investigations in the District of Columbia, is a material witness in such a prosecution or a grand jury investigation in the District of Columbia which has commenced or is about to commence, a judge may issue a certificate under seal stating these facts and specifying the number of days the witness will be required. The certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of the United States or the District of Columbia to assure his attendance in the District of Columbia. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

(b) If the witness is summoned to attend and testify in the District of Columbia he shall be tendered the fees and allowances authorized for witnesses in criminal cases in United States district courts. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within the District of Columbia for a period longer than that specified in the certificate, unless otherwise ordered by the court. If the witness, after coming into the District of Columbia, fails without good cause to attend and testify as directed in the summons, he may be punished in the manner provided for the punishment of any other witness who disobeys a summons issued from the court in the District of Columbia where the prosecution has been instituted or the grand jury investigation has commenced or is about to commence. (July 29, 1970, 84 Stat. 651, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1503.)

§ 23-1504. Exemption from arrest.

(a) Any person who comes into the District of Columbia in obedience to a summons directing him to attend and testify in the District of Columbia shall

not, while in the District of Columbia, pursuant to the summons, be subject to arrest or the service of process, civil or criminal, in connection with any matter which arose before his entrance into the District of Columbia under the summons.

(b) Any person who is in the process of passing through the District of Columbia for the purpose of proceeding to or returning from a State which has summoned him to attend and testify shall not be subject to arrest or the service of process, civil or criminal, in connection with any matter which arose at some other time. (July 29, 1970, 84 Stat. 652, Pub. L. 91-358, title II, § 210(a); 1973 Ed., § 23-1504.)

CHAPTER 17. DEATH PENALTY.

Sec.

23-1701 to 23-1705. [Repealed].

§§ 23-1701 to 23-1705. Capital punishment; provision for death chamber; appointment of executioner and assistants; fees; sentences to be in writing and certified copy furnished; who may be present at execution; fact of execution to be certified to clerk of court; place of execution.

Repealed. Feb. 26, 1981, D.C. Law 3-113, § 3, 27 DCR 5624.

Legislative history of Law 3-113. — Law 3-113, the “District of Columbia Death Penalty Repeal Act of 1980,” was introduced in Council and assigned Bill No 3-395, which was referred to the Committee on the Judiciary. The Bill was adopted on first and second readings on Novem-

ber 12, 1980 and December 9, 1980, respectively. Signed by the Mayor on December 17, 1980, it was assigned Act No. 3-307 and transmitted to both Houses of Congress for its review.



